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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]16

LOUIS KANN, SIGMUND KANN, AND MYER COHEN,
APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

No. [redacted]17

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE
A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLEE.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20579

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 202.

LOUIS KANN, SIGMUND KANN, AND MYER COHEN,
APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

No. 203.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT.

The above are two appeals, by the respective appellants, from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the supreme court of the District of Columbia, printed at page 482 of the Record, in an

equity suit by appellee against the appellants, seeking relief against the forfeiture of a lease.

The material facts are as follows:

On July 8, 1890, the late Marianne A. B. Kennedy, testatrix of the appellant Webb, leased to Henry King, Jr., premises No. 715 Market space for a term expiring, with its extensions, on the 1st day of October, 1908, at a rental of $2,400 per annum, the lessee covenanting (1) to pay the rent promptly; (2) to use the "store part" only as a fancy and dry goods store, and the remaining parts of the building as a dwelling-house or for offices; (3) not to sublet or assign without lessor's written consent; (4) to keep the demised premises in good repair; (5) to pay or to cause to be paid in each and every year of the term all taxes; (6) to surrender peaceably at the end of the term in good condition and repair; and (7) to pay the rental in equal monthly instalments, with an option to the lessor to determine the lease upon default in the performance of any of the covenants enumerated (Record, p. 13).

On August 15, 1897, Henry King, Jr., died, and the lease was assigned to the appellee, Caroline King, Mrs. Kennedy consenting, in writing, to the transfer and assignment (Record, p. 17).

The bill alleges that through an oversight and inadvertence arising from complainant's affliction and mental distress in consequence of the then recent death of Henry King, Jr., who was her husband, and of the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be entangled, the instalment of taxes due upon the property for the second half of the fiscal year ending June 30, 1898, was overlooked and left unpaid; that at an attempted tax sale thereof on account of that default, and without her knowledge of it, one C. H. Wiltsie, of Rochester, New York, a dealer in tax titles, bid in the property for $143.83, she continuing to pay the rent and all subsequent taxes; that two years later, when the tax

sale, if valid, had become irredeemable, Wiltsie demanded from her repayment of the price paid by him, with 15 per cent. per annum thereon, and an additional $100 to release his claims; that considering this demand excessive, and being advised that the sale was wholly void, she entered into a negotiation with him for a compromise at a less exorbitant figure; that the appellants Sigmund Kann and Louis Kann, who are her rival and competing merchants, their stores surrounding hers, had some months prior endeavored to deprive her of her said place of business premises by offering Mrs. Kennedy an increase of $100 per month over the rent fixed by her lease, and had failed in this effort only because her lease protected her in the possession of the premises until 1908; that in September, 1901, one Charles H. Knight, a practitioner in tax-title matters, being aware of the fact of the attempted tax sale and that it was invalid because the assessment, advertisement, and sale were in the name of Maria T. Gillis, whereas Mrs. Kennedy was and for many years had been the owner of the property, approached the Kanns in respect to the matter, was informed by them that Mr. Webb was the attorney of the owner, and thereupon called upon Mr. Webb, offering to secure annulment of the tax sale because of its said invalidity; that Mr. Webb then informed Mrs. Kennedy of the tax sale, advising her that she might either treat it as a ground of forfeiture or not, but that, in his opinion, it would be to her interest to enforce forfeiture; that, being informed by her that she did not see how she could do this unless first certain of a new tenant (Record, p. 95), he inquired of Myer Cohen, the attorney of the Kanns, whether they were still willing to pay $300 per month for the property, and, receiving an affirmative answer, a lease from Mrs. Kennedy to the Kanns was forthwith agreed and determined upon between them, "so far as an unwritten agreement could settle it" (Record, p. 43).

After learning from Mr. Webb that the tax sale had become irredeemable, and that the tax title was held by Mr.

Wiltsie, Mr. Cohen conceived the idea of going to Rochester, where Wiltsie lived, and of purchasing it for the Kanns; and, "desiring to avoid the appearance of any concealment of his purpose from the said Webb," he informed Mr. Webb, at six o'clock in the evening, of his purpose, and that he and Cohen "must deal at arm's-length;" to which Webb replied, "I do not know about that," and Cohen answered, "Well, I do" (Record, p. 45). This interview, Mr. Cohen testifies, took place at six o'clock, p. m., of the day on which he proposed going to Rochester, and at an hour when the banks and the courts were closed, so that, as he further states, Mr. Webb had no facilities for making pecuniary arrangements for forestalling or competing with Mr. Cohen in getting in the tax title, or access to the courts to enjoin him from doing so (Record, pp. 400-1). The extensions of the term of the lease, to which it owes its present existence, were, all of them, prepared by members of Mr. Cohen's law firm (Record, pp. 390-1, 423-4), while Mr. Cohen's knowledge of the fact which made the tax title valuable, namely, the fact that the time within which to redeem from the tax title had expired, was derived by him from Mr. Webb in the course of the treaty or negotiation between them which resulted in the agreement for the lease from Mrs. Kennedy to the Kanns (Record, pp. 382-4), and after he had agreed that the Kanns would take the lease. His object in acquiring the tax title was "to hold it as a club" which he "could use as necessary against either Mrs. Kennedy or Mrs. King" (Record, pp. 382-3); the occasion or cause of this precaution being that, in a former instance, Mrs. Kennedy, after making some concession to the Kanns in regard to the property, had been induced by her tenants, the Kings, to withdraw it, and the desire of Mr. Cohen to prevent any similar change of attitude in the matter of the lease (Record, p. 423).

Arriving in Rochester, it is testified by Mr. Wiltsie that Mr. Cohen was told of the fixed rule of Wiltsie's office not to dispose of tax certificates to parties who were not in-

terested in the property or the title, and, upon being asked the question, stated that he represented parties so interested (Record, pp. 254, 259-60); and, although this is denied by Mr. Cohen, Mr. Wiltsie is corroborated by his cashier, Miss Watson, who testifies, at page 267, that Mr. Cohen declared he represented interested parties, and asked whether he could "redeem" the certificate. According to his own testimony, upon being informed by Mr. Wiltsie that the latter had been asking $300 for the certificate, Mr. Cohen immediately offered him $500; whereupon, having first learned by telephoning to the Central National Bank of Washington, where it had been deposited by Wiltsie pending the negotiation for its extinguishment, that the Kings had not redeemed it, the tax certificate was recalled, the bargain closed, Mr. Cohen returned to Washington on October 3, and on the same day surrendered the tax certificate, obtained a tax deed from the Commissioners, and recorded the same, explaining, at page 404, that he had obtained and recorded the tax deed in one day instead of waiting the usual length of time, which is a week or ten days, through fear that he "might be stopped by an injunction or something."

The day following the recording of the tax deed, Mr. Cohen, being waited upon by Mr. Tobriner as the attorney of Mrs. King and interrogated as to his purpose in obtaining the tax title, answered, "You know that I have been for some time trying to get a lease of these premises for the Kanns, and I bought this tax deed with the expectation of forcing the Kings out of the property, and of being able to put the Kanns into possession of it" (Record, p. 238). Being informed by Mr. Tobriner of the impossibility of getting Mrs. King's title through any arrangement with her, there being an equity suit pending by creditors of her husband attacking the validity of the assignment of the lease to her, he proposed that this difficulty be gotten over through the expedient of a landlord and tenant proceeding against Mrs. King, a pre-arranged judgment by default against her, and

the leaving of a sum of money on a table or elsewhere, where the Kings might find it, as a consideration for acquiescing in such judgment by default (Record, pp. 238, 249-50, 274, 416-17, 480-1).

In Mr. Webb's answer, and in certain correspondence with the reprsentatives of Mrs. King following his client's refusal, upon his advice, to accept the October rent and her election to declare the lease forfeited, such action is stated to have been taken because of Mrs. King's default in the payment of the tax, culminating in the hostile tax deed, which, it was claimed, rendered it imperative that Mrs. Kennedy should insist upon the termination of the lease and resumption by her of possession of the property (Record, p. 22), and made it improper that she should allow the use of her name in legal proceedings to vacate the tax deed "in favor of a person who has proved so faithless to the important obligations contained in the lease" (Record, p. 23). These grounds for the position then taken are, however, admitted by Mr. Webb to have been merely Pickwickian or "legal," the real reasons, as candidly admitted by him, being the desire of Mrs. Kennedy, upon his advice, to get rid of the long lease which Mrs. King held, and to secure the higher rental which the Kanns were offering to pay (Record, pp. 309, 316-17, 351, 354-5). There was, in reality, no hostility to the Kings at all, but merely a question of a higher rent and a shorter term (Record, p. 317); and Mr. Webb, with Mrs. Kennedy's concurrence, was in the act of preparing a proposition for continuing Mrs. King in possession at an increased rental on the 9th day of October, when he received a call from Mr. Cohen and an attorney for the Kanns, the result of which call was to cause him to throw into his waste basket the compromise proposition upon which he was engaged, and to lead his client and himself thereafter to act in concert with the Kanns in insisting upon the forfeiture with the view of giving them a lease and possession of the premises (Record, pp. 349, 352, 353-4, 325, 326).

This interview of October 9 between Mr. Cohen, the counsel of the Kanns, and Mr. Webb was occasioned as follows: On the preceding day, October 8, Mr. Cohen had been informed by Mr. Webb that a Mr. Cahill, representing Mrs. King, was endeavoring to negotiate a compromise of the forfeiture, and, upon Mr. Cohen's claiming that an agreement had been made between them for a lease to the Kanns, Mr. Webb stated that he did not so consider the matter, and that his own duty was to his client under the circumstances (Record, p. 370). Thereupon Mr. Cohen, being thus made aware that proposals for a new lease with the Kings were under consideration, and that Mrs. Kennedy was not then intending to lease to the Kanns, but to allow the Kings to continue their occupancy (Record, p. 414), concluded that the time had come to use the "club" which he had obtained through his purchase of the tax title, and proceeded to employ counsel for the purpose (Record, pp. 408-9); and, calling with his counsel on Mr. Webb on the following day, October 9, they informed him that the tax certificate was owned by the Kanns, and that they would not surrender it (Record, p. 291); that if Mr. Webb would get rid of the Kings and lease the property to the Kanns, they would take a lease at $300 per month and surrender the tax certificate, but that if he should refuse to do this they would hold the tax title in hostility to Mrs. Kennedy, and possibly bring ejectment proceedings against her (Record, pp. 292, 318); that if Mr. Webb did not eject the Kings and make the Kanns a lease, they would enforce their title—that they would hold it adversely, and Mrs. Kenedy must take the consequences (Record, p. 319).

These representations Mr. Webb regarded as a "threat," and "acted accordingly" (Record, p. 318). He had entered into the negotiation with Mr. Cahill for a compromise with the Kings in pursuance of Mrs. Kennedy's desires (Record, p. 349); but, as the result of this interview of October 9, "the situation then completely changed," and he informed

Mr. Cahill that it was "impossible to negotiate with him"—because this could only be done "by fighting for the existence of the property, and I did not care to run that risk for this lease, which we were anxious to get rid of" (Record, p. 352). "The entire change of situation" referred to was, simply, the threat made at the interview of October 9 (Record, p. 354). At that interview, and as the result of it, Mr. Webb threw the Cahill compromise into his waste basket (Record, p. 325), informed Mrs. Kennedy fully of the threat, told her that the Kanns held the tax title, which they offered to surrender if the property were turned over to them as tenants, but if this were not done that they would hold it adversely, and she must take the consequences, and thereupon advised her "to accept the lesser of the two evils, to forfeit the lease, and lease the property to the Kanns," and informed her that, if she would not do this, they would endeavor to assert the tax title, and that they might take her property from her (Record, p. 319), and he thereafter informed the counsel for the Kanns that Mrs. Kennedy had decided to accept their proposal (Record, p. 326).

The version of this interview of October 9 given by Mr. Cohen, while presenting it somewhat more euphuistically, coincides with that of Mr. Webb in every practical or essential respect (Record, pp. 414-15), as does the statement of it in the brief filed on his behalf at pages 13-14, 42-3. The counsel for the Kanns were informed by Mrs. Kennedy's physician, at an interview between them arranged by Mr. Webb, that she was very old, in frail health, and liable to be seriously affected in her health if litigation should ensue; with which knowledge he and Mr. Webb were informed that litigation was inevitable (Record, p. 411). Mrs. Kennedy died on the evening of the day on which the bill in the case was filed.

The circumstance that this interview between Dr. Fry and the counsel of the Kanns, in the effort of the former to spare his patient the danger which he apprehended to her

life and health, was not sought by them, but was arranged by Mr. Webb, is declared at pages 39-40, to be "an important fact," while, at page 38, it is declared that duress cannot be predicated upon the interview, because it was never communicated to Mrs. Kennedy. Inasmuch, however, as the arrangement for the interview followed, and was obviously occasioned by their interview with Mr. Webb of October 9, and the statement then made of their intention and purposes, the importance of the former of these claims is not clear, while the latter of them is in direct conflict with the undisputed testimony in the case at page 319 of the Record.

As has been stated, the lease contained a covenant upon the part of the lessee to pay, in each and every year of the term, all taxes assessed against the property from its date in 1890, and the covenant was performed until after the death of Henry King, Jr., the original lessee. The lessee, however, was not intrusted by the lessor with the duty of paying the taxes, the covenant of the lease in that regard being performed in the following manner: The lessor, at each tax-paying date, ascertained and communicated to the lessee the amount of the tax, demanded his check for its amount, and then herself, through her own agents, paid the tax, furnishing a striking illustration in this very case of what was said by the Court of Appeals when the case was first before it, in 21 D. C. App., at page 152, viz:

"A lessor does not escape the duty of vigilance, which is no very difficult duty, to see that the taxes on his property are paid, when by agreement he has shifted the burden of payment from himself to the lessee as between themselves. It is not more difficult for him to make inquiry in this regard for the purpose of preventing a forfeiture, than it is to make similar inquiry for the purpose of enforcing a forfeiture."

In the answer of Mr. Webb, at page 78, it is averred that from 1890 to 1897, when he died, Henry King, Jr., did not pay any of the taxes as he had covenanted to do, which

charge is echoed in the answers of Cohen and of the Kanns (Record, pp. 37, 63). The proof to the contrary, however, consisting of the letters of Mrs. Kennedy to Henry King, Jr., stating from time to time the amount of the taxes due and calling for his checks to cover them, and the checks of Mr. King in response to these demands, endorsed by Mrs. Kennedy in her own handwriting, and afterwards, in some instances, by her agents Swormsted and Bradley, or R. E. Bradley, through whom the payments were made (Record, pp. 166-8, 197, 276-9), is conclusive and is admitted to be so by Mr. Webb himself in his testimony (Record, pp. 303-4).

With respect to the non-payment of the taxes on the two small parcels of land in the rear of the premises (see plat, Record, p. 54), which is insisted upon by the appellants as an additional breach of the covenant, the allegations of the 11th paragraph of the bill that these parcels, one of which contains 117 square feet and the other 16 square feet, were never considered or treated by the parties to the lease as covered by the covenant, are substantiated by the letters of Mrs. Kennedy above referred to. In these letters she states specifically the amount of the taxes for which the lessee was liable, and she received it from him, he naturally supposing that her demands fully covered the taxes payable by him to her, as they purported to do. The appellee has paid all the taxes upon these rear parcels since the matter was called to her attention (Record, p. 482).

With reference to the default in the payment of the taxes under which the attempted tax sale was made, the testimony shows that, in December, 1897, Mrs. Kennedy notified Joseph King, son of the appellee, that she had neglected to pay the instalment of taxes which fell due in November of that year, and asked if the Kings would not see that it was paid (Record, pp. 154-6), which was promptly done (Record, p. 169). She made no similar subsequent request, and gave no notice that she intended to change what had been, from

the date of the lease, her invariable course of dealing with the lessees, namely, that of notifying them of the amount of the taxes, requesting a check for the amount, and, herself, paying the taxes. She discontinued that practice without any information or suggestion to Mrs. King that she was no longer to expect such notice, but was herself to attend to the matter of ascertaining their amount and seeing to their payment. As a result, and of the mental distress, anxiety, and worry of the appellee and her family in consequence of her husband's death, and of the condition in which his financial affairs were found to be at his decease (Record, p. 170), the matter was overlooked until the year 1900, when appellee's son Harry King, in his capacity as one of the receivers for his father's estate, and then engaged in paying taxes on the same, requested his bookkeeper, Mr. James G. Rodgers, to inquire as to the taxes on 715 Market space (Record, p. 171), and paid the taxes which Rodgers reported to be due (Record, p. 171). This was in July, 1900 (Record, p. 126), and the tax so paid was for the fiscal year ending June 30, 1900 (Record, p. 280). Mr. Rodgers testifies that he asked at the tax office for a bill of all the taxes that were due, and that he was informed by the tax clerk that the bill in question was for everything that was then due (Record, p. 126). He testifies that, on May 21, of the following year, 1901, he was sent by Harrry King for the tax bill for that year, received it, obtained from Mr. King a check for its payment, and, when he returned to the tax office to pay it, was informed that there were some back taxes; that he remonstrated with the tax officials, reminding them that they had told him the year before that the bill then given him covered all the then arrears, and that he then said to them, "Give me a bill for whatever is due on the property and I will get another check;" that they then gave him a bill for the last half of 1898 and for the whole of 1899; that he went back to Mr. King, got a second check for the amount of these latter bills, and paid both of them (Record, pp. 127-8, 281-4).

At the hearing below, both in the briefs and the argument, it was sought to be assumed that Mrs. Kennedy's request, through Joseph King, was that the Kings would thereafter attend to the payment of all future taxes, without request or notice from her to remit to her for the purpose, as had theretofore been her custom. The testimony upon the subject, at page 155 of the Record, refutes the assumption. The request referred only to the November, 1897, instalment, then already due, and was a request to pay that instalment, which had been overlooked.

Mr. Rodgers' testimony was given several years after the transactions to which it relates, and, at first, without having refreshed his memory by any examination of the books kept by him, in which books the transactions in question were entered. At a subsequent session, having examined the books in the meantime, he admitted some inaccuracies as to particulars (Record, p. 140 *et seq.*), but in none, it is submitted, which affords just ground for criticism of his integrity, or of the substantial accuracy of his testimony in all its material parts. Having testified, further, on cross-examination, that, as he remembered it, the tax bill for the year ending June 30, 1900, had been made out before he called for it, and was taken by the tax clerk out of a box containing bills already prepared (Record, p. 150), an attempt was made to discredit him, although the matter was wholly without materiality, by calling as a witness Miss Lidie Addison, the tax clerk in whose handwriting the bill was, who testified that she had not informed Mr. Rodgers that there were no back taxes, and that the custom of making out bills in advance and keeping them in a box was not inaugurated until the following year, 1901 (Record, pp. 452-3). On cross-examination, however, she admits the fact that the bill, though made out by her, might have been delivered to Mr. Rodgers by some other of the clerks in the tax office at the time, and that the bill has upon it the letter "A," in red pencil, which method of marking bills,

according to her recollection, also, was not inaugurated until the year 1901 (Record, pp. 454-5). No one of the several other clerks employed at the time in presenting tax bills to applicants was called, nor any effort made either to corroborate or to reconcile Miss Addison's testimony in regard to the date at which the keeping in a box of tax bills, made out in advance, or of marking them with a red letter "A," originated.

The entire matter of the corrections made by Mr. Rodgers in his testimony at the second session at which he testified, and of the attempted contradiction of him by Miss Addison, is clearly irrelevant to any material question in the case, and is only referred to here in justice to the witness, in view of the attacks sought at the hearing below to be made upon him. Both he and Harry King testify that Rodgers' instructions were to ask for all the taxes that were due upon the property (Record, pp. 132, 171), and he testifies that he did so. Even if he did not, of which there is no evidence, the negligence would be that of the agent and not of the principal, which, under the authorities, exonerates the latter from the guilt of personal or willful negligence, such as will preclude relief against forfeiture (Noyes *vs.* Anderson, 124 N. Y., 175).

The statement in the Brief for Webb, at page 141, that Harry King was a systematic defaulter in the payment of taxes on his father's estate has no other foundation than the fact that between February and July, 1900, he and Judge Barnard, as receivers of the estate of his father, had settled a number of tax claims against property of the estate. His testimony, quoted at pages 142-3 of the Brief, needs but to be read in connection with that at page 170 of the Record, to which the former plainly refers, to show how equally unfounded is the claim that the failure to pay the tax was from sheer neglect or because it was pecuniarily inconvenient. There is not a syllable of testimony to show that the neglect was willful, or that the payment was pecuniarily inconvenient.

Equally untenable is the contention, at pages 54-6 of the Brief in No. 202, that the finding by the Court of Appeals in its opinion that the appellee was in the midst of financial trouble and distress caused by the recent death of her husband, and that her default was excusable under the circumstances is unfounded, because the husband's death occurred ten months before the default, and the record shows that she successfully conducted the business, and was not "strained at all" in so far as that business was concerned. The allegation of the bill in this record (Record, p. 3) does not refer to the mercantile business conducted on the premises in controversy, but to the "perplexity and distraction caused by the unfortunate condition in which his [*i. e.*, her husband's] business was found to be after his death;" and that this perplexity and distraction continued after the default, is shown above.

This question, like that *infra*, as to whether the request by Mrs. Kennedy in December, 1897, was that all future taxes, or only the then overdue instalment, should be paid by Mrs. King, in departure from what had theretofore been the lessor's practice under the lease, was a question of fact, as to which this court cannot be called upon to review or reverse the findings of the lower courts, unless there is a clear showing of error.

Dravo *vs.* Jabel, 132 U. S., 487.
Stuart *vs.* Hayden, 169 U. S., 1.
Shappirio *vs.* Goldberg, 192 U. S., 232, 240.

The allegation in the answers of the defendant Cohen (Record, p. 39) and of the defendants Kann (Record, p. 65), apparently adopted in the answer of the defendant Webb (Record, p. 68), that the lessee violated the covenant of the lease to use the "store part" only as a fancy and dry goods store and the remaining parts of the building as a dwelling-house or for offices, is disproved by the testimony of Joseph King, Harry King, and Philip King (Record, pp. 153, 178, 203), and is not attempted to be supported by

any evidence. The charge of the answers that a structural change was made, depriving the premises of a front entrance, is met by proof that this change, which was a material improvement to the property, was made with Mrs. Kennedy's knowledge and entire concurrence, and that when completed she congratulated the Kings upon it (Record, pp. 154, 178, 203), the testimony upon this point also being uncontradicted. There is, moreover, no provision in the lease against structural changes, or for forfeiture because of them.

On November 9, 1901, a landlord and tenant proceeding was instituted against the appellee to eject her from the premises, on the ground that she had forfeited her term by the omission to pay the taxes, whereupon she filed her bill in this cause to restrain that proceeding, and to be relieved against the forfeiture upon terms tendered in the bill, of paying the taxes due, with any legal accumulation of interest and penalties and all costs and expenditures which should be adjudged equitable, the bill alleging that the tax-title was void for the irregularities which will be presently pointed out, and that it, therefore, presented no obstacle to the relief sought. The original defendants were the lessor, Mrs. Kennedy; Myer Cohen, the tax-deed grantee, and Sigmund Kann and Louis Kann, the actual purchasers and beneficial holders of the tax title. Upon the death of Mrs. Kennedy, her executor, Henry Randall Webb, and Maria G. Dewey, her heir-at-law, the will containing no residuary devise or bequest, were made parties.

The decree of the supreme court of the District of Columbia of June 30, 1904, declared the tax deed null and void, and granted relief against the forfeiture as prayed upon payment by the appellee of the rent and taxes, accrued penalties and interest, one-half of the cost to be paid by her and the other half by the defendants Cohen, Kann and Kann. This was affirmed by the Court of Appeals, from whose decree the first of the above appeals is taken by the appellants Kann, Kann, and Cohen, and the second of them by Henry Randall

Webb, executor. Mrs. Dewey has not concurred in or sanctioned the appeal, but has expressly declined to do so (Record, p. 484).

POINTS AND AUTHORITIES.

As to the breaches of the covenants in the lease other than that for the payment of taxes, which are set up in the answers, the violations alleged were that the "store part" of the premises had been used for other purposes than those of a fancy and dry goods store, and the remaining parts of the building for other purposes than those of a dwelling-house or for offices, to which was added a charge which, if true, would not have been a breach of any of the covenants, namely, that the lessee had wrongfully closed up one of the front entrances to the premises. As pointed out *supra*, each of these charges is completely refuted by the testimony of the witnesses produced on behalf of the appellee, while no testimony was offered to support them.

The other assignments of error in the decree below may be summarized as follows:

I. That the court erred in holding that the tax deed was void.

II. That the court erred in holding the circumstances under which and the purposes for which the tax title was procured to be such as to entitle the appellee to relief.

III. That the court erred in not holding that the bill was multifarious.

IV. That the court erred in holding that the delay of the appellee in redeeming the tax certificate from Wiltsie was not, under the circumstances of the case, laches such as to preclude her from relief.

V. That the court erred in refusing to hold that omission to pay the taxes was a ground of forfeiture against which courts of equity cannot relieve.

VI. That the court erred in not dismissing the bill because of fraud charged against appellant Webb in No. 203 and not proved.

I.

IS THE TAX TITLE VOID?

The tax assessment, under which the attempted sale was made, was governed by the provisions of the act of Congress of August 14, 1894, 28 U. S. Stats. at Large, page 282, the first section of which is as follows:

"All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided, according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed 'owner unknown.' "

The sale, itself, was governed by the act of February 28, 1898, 30 Stats. at Large, page 250, which, after enacting in its first section for publishing a notice of sale, "which shall contain the name of each and every person in which each piece of property is assessed," *i. e.*, the name of the owner, under the foregoing requirement, etc., provides in the fifth section as follows:

"That the collector of taxes shall, within five days after the last day of sale hereinbefore provided for as aforesaid, file with the recorder of deeds a written report in which he shall give a statement," as follows:

1. Of the property sold, other than that sold to the District of Columbia.

2. To whom assessed.

3. The taxes due.

4. To whom sold.

5. The amount paid.

6. The day of sale.

7. The cost thereof.

8. The surplus, if any.

The only published notice of sale is that shown at page 124 of the Record. If, in respect to sublot A, the property concerned in the tax title, the notice can be claimed to contain the name of the person in which it was assessed, which is not conceded, the name so contained was that of Maria T. Gillis, who had died in January, 1871, intestate, leaving as her only heir-at-law Marianne A. B. Kennedy (Record, p. 126). It was also shown that the assessment was made in the name of Mrs. Gillis (Record, p. 160).

With respect to the report required by law to be filed by the collector of taxes, the testimony shows that on May 9, 1899, that officer delivered to the recorder of deeds what, made up in loose or unbound sheets, purported to be his report (Record, pp. 229, 471). Instead of being allowed to remain in that office, however, it was returned to the collector on the 5th day of April, 1900, since which time there has been no report of this tax sale filed in the office of the recorder of deeds (Record, pp. 229-30).

There is, it is true, what is claimed to be a copy of the said report recorded among the land records of the District of Columbia; but, in the first place, there is no provision of law either authorizing the report to be recorded or permitting it to be withdrawn after such record, and, in the second place, the so-called record copy, transcribed into several disconnected books, with no certification of any character as to at

least two of these books, in one of which the only reference to the property in controversy appears, is so fragmentary, vague, and uncertain as to be without any legal sufficiency or effect, even if there were a law providing for recording the report at all.

The so-called record copy begins, apparently, in Liber 2391, and fills up the remainder of that liber. Without anything in the nature of a reference to what precedes or follows, or to direct attention, and with twenty-eight intervening libers filled with unconnected matter, another portion of the so-called report entirely fills Liber 2419. Then, with seventeen libers of the land records filled with other matter, what is claimed to be the remainder of the report is contained in Liber 2436, with the same omission of identification, or reference of any kind to direct attention to the first volume. Excepting a top-page heading, "Real-estate tax sale, District of Columbia, April 12 to 19, 1899," Libers 2419 and 2436 contain no certification or explanation, the import of the contents of these volumes, the first of which, as above stated, contains the only reference to lot A, in square 432, being left to inference and conjecture.

As will be seen by inspection of the so-called report, at page 234 of the Record, it omits to state, except by implication, to whom the property is assessed. It omits to state the amount of taxes due; it omits to state, except by possible inference or implication, the name of the purchaser; it omits to state the amount paid, the day on which the property was sold, or the cost of the sale (Record, p. 234)—all of these omissions being contrary to the express requirements of the statute under which the attempted sale was made.

The tax sale is accordingly invalid, for the following reasons:

1. Because the property was not assessed or advertised in the name of the owner.

2. Because the collector of taxes did not file his report in the office of the recorder of deeds as required by law.

3. Because of the omission of the report to comply with the requirement of law in the half dozen particulars above enumerated.

1.

THE ERRONEOUS ASSESSMENT AND ADVERTISEMENT.

In the court below, it was urged on behalf of appellants that the requirement of the act of August 14, 1894, that all real property in the District of Columbia should be assessed in the name of the owner, etc., applied only to assessments theretofore made, and was without application to the 1896 assessment, under which the tax sale was attempted to be made; and, assuming that the same position may be taken here, a brief examination of that question becomes necessary.

Under an act approved August 5, 1892, an assessment had been made by a board of three assessors, which proved unsatisfactory to the public. In appointing a permanent board of assessors, the act of August 14, 1894, provided that this new board should revise and equalize the assessment made under this act of 1892; and the claim by appellants in the court below was, that it was only in respect to assessments made under that act of 1892 that the assessment was required to be in the name of the owner. This contention was based upon the proposition that, since the first section of the act of August 14, 1894, enacted "that all real property in the District of Columbia, *except as hereinafter provided*, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof;" and since the third fourth, and fifth sections of the act provided that real property should be assessed and valued in the year 1896, and every third year thereafter, that the Commissioners should furnish each member of the board of permanent or assistant assessors "with the necessary maps and field books, which shall contain an accurate list of each tract, together

with a pertinent description of the real property situate in the District of Columbia, and, *as far as may be known,* the owner thereof," and that the Commissioners should make "such rules and regulations touching the manner in which the real property shall be described in the assessments returned by the assessors as they may deem best," the provisions of these three sections should be construed as the exceptions "hereinafter provided" referred to in section one; and that, under these subsequent sections of the act, the only requirements were that the Commissioners should furnish the assessors with maps and field books containing a description of all the property, and, "as far as may be known, the owner thereof," and that they should make such rules and regulations touching the "manner in which the real property should be described in the assessments returned by the assessors as they may deem best."

Divesting the matter of ingenious paraphrase and phraseology, the statute, if the foregoing is the true construction, stands as follows:

"That all real property in the District of Columbia shall be assessed in the name of the owner, or trustee or trustees of the owner thereof, except that the Commissioners shall furnish the assessors with necessary maps and field books containing a proper description of all the property and, as far as may be known, the owner thereof, and except that the Commissioners may make such rules and regulations touching the manner in which the real property shall be described in the assessments returned by the assessors as they may deem best."

As to so much of the foregoing contention as is based upon the use of the words in the first section, "except as hereinafter provided," the natural purport and meaning of those words is clearly found in the following paragraph of the very section in which they are contained—the first section as a whole reading as follows:

"That all real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name

of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed 'owner unknown.' "

In other words, the exceptions "hereinafter provided" are (1) the undivided property of a deceased person, which may be assessed in his name until the same is divided according to law or has otherwise passed into the possession of some other person or persons, and (2) all real property the ownership of which is unknown, which property shall be assessed "owner unknown." Nor can the provision of the fourth section, providing that the Commissioners should furnish each assessor with a map and field book of his respective subdistrict, containing an accurate list of each tract, a description of the real property situate therein, and, as far as may be known, the owner thereof, be held to cut down the meaning of the first section so that it should no longer require property to be assessed in the name of the owner except in so far as the Commissioners might happen to know who the owner was at the time they were thus equipping the assessors.

Neither does the provision of section 5, authorizing the Commissioners to make such rules and regulations as they might deem best touching the manner in which the real property shall be described in the assessment returns repeal section 1, which provides, not how the real property shall be described, but that it shall be assessed in the name of the owner.

As a mere matter of construing the phraseology employed, therefore, it is submitted that the construction contended for on behalf of the appellants is untenable.

In addition, however, statutes are to be construed, not solely or mainly by their phraseology, but with reference to the object which they were intended to secure. What was

the object of the provision that property should be assessed in the name of the owner? The answer to this question is plain and simple. The subject-matter of the act was not new. Similar provisions are to be found in the tax laws of nearly every State in the Union, and the courts have declared the object to be to give the owner, whose property is thus made liable to practical confiscation through the means of a tax sale, that kind of notice which will be the most likely to attract his attention. As this court said in City of Washington *vs.* Pratt, 8 Wheat., at page 686:

"The name of the real party in interest must have been, in the eye of the Congress, the most awakening circumstance of advertisement required to warn him of his danger."

No reason can be conceived why Congress should have intended that persons whose property might be endangered by tax sales assessed under the act of 1892 should have the benefit of advertisement in their own names as "the most awakening circumstance" to warn them of their danger, but that no owner should have the benefit of such warning whose property was to be sold under the subsequent asesssment provided for. Such a construction would be, not simply unreasonable, but inexplicable and absurd.

Still in addition, and reverting to the prior state of the law, which all the authorities agree is a proper starting point in the construction of any statute, we find that precisely the same provisions are contained in the act of March 3, 1883, which act is not complicated with or accompanied by any possible division line between assessments covering different periods. The first section of this act provides:

"All real property, except as hereinafter provided, shall be assessed in the name of the owner, trustee or guardian thereof; all undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided according to law, or has otherwise passed into the possession of some other person. All real property, the owner of which is unknown, shall be assessed 'owner unknown.'"

Section 4 of the act of 1883 contains the identical provision that the Commissioner shall furnish each assessor with a map and field book containing an accurate list of each tract, together with a pertinent description of the real property situate therein, and, as far as may be known, the owners thereof," etc.

Section 5 provides that assessments shall be, in Washington and Georgetown, according to the number of the squares and lots thereof, or parts of lots, or upon the number of square or superficial feet in the square or parts of lots, and, in the county, that agricultural lands shall be assessed by the acre, and suburban lots by the square foot as in the city of Washington; while section 5 of the act of 1894, in lieu of this specification of a different manner of describing urban and agricultural real estate, substitutes the provision that the Commissioners may make rules and regulations touching the manner in which the real property shall be described in the assessment returned by the assessors.

It is respectfully submitted that the attempt to confine section 1 of the act of 1894 to assessments begun by the board of assessors appointed under the act of 1892, referred to in the second section of the act, and to have all subsequent assessments governed only by the other sections of that act, exclusive of sections 1 and 2, is an impossible one, looked at from the standpoint of the phraseology of the act, or the object of the provision, or of the statutes *in pari materia,* or from any standpoint whatsoever. It presents no question, we submit, that the court can be expected seriously to entertain, and still less a question as to which any doubt can exist.

Taking either act together as a whole, as each must be taken, sections 1 and 4 provide that the property is to be assessed in the name of the owner, except in the case of the undivided real estate of a deceased person which has not passed into the possession of some other person, and except real property the ownership of which is unknown, and which

is to be assessed "owner unknown;" and that the Commissioners are to aid each assistant assessor by giving him a list of each tract within his subdistrict, with a pertinent description of the real property therein and, as far as may be known, the name of the real owner thereof. To assess it in the name of one who is not the owner, and who had not been for 27 years, was not a compliance with either of the alternatives allowed by the act.

If, as we submit, it is clear that the statute required the assessment to be in the name of the owner, and if, as is not controverted, the assessment in the present case was not in the name of the owner, it only remains to consider the effect of a different non-compliance with this requirement of the law.

(*a.*) If it be true, as all the authorities agree, that a strict, rigorous compliance with all the substantial requirements of the law is required to divest the owner of his property through a tax sale, there would seem to be but one answer to this question, if it were wholly new.

(*b.*) If, in addition, as this court and the authorities generally agree, the object of the requirement that the assessment be in the name of the owner is to afford him the warning of this the most "awakening circumstance," as a condition precedent to divesting him of his title, the same answer results from this additional point of view.

(*c.*) If, still in addition, this, the court of last resort in this jurisdiction, has expressly decided that non-compliance with the law in this respect is absolutely fatal to a tax sale, by a decision which stands unreversed and unmodified, this would seem to be, of itself, conclusive to the same effect; and, if there have been repeated subsequent decisions by this court declaring the same principle, it is difficult to see how this court can be asked to hesitate over the question.

(*d.*) If, still in addition, the result thus arrived at upon the preceding considerations is one repeatedly and universally recognized by all other tribunals throughout the country, the question would seem to be entirely incapable of further discussion.

(*a.*)

That strict and rigorous compliance with all substantial requirements of taxing acts is an essential and indispensable prerequisite to a valid tax sale, is elementary, and so universally recognized that it probably will not be questioned. As illustrative of the authorities declaring the rule may be instanced

Williams *vs.* Peyton, 4 Wheat., 77, 79.
Ronkendorff *vs.* Taylor's Lessee, 4 Pet., 349, 359.
Marx *vs.* Hanthorn, 148 U. S., 172, 180.
Early *vs.* Doe, 16 How., 617-18.
Sargent *vs.* Bean, 7 Gray, 125.
Desmond *vs.* Babbitt, 117 Mass., 235.
Milner *vs.* Clarke, 61 Ala., 258.
Ex parte Thacher, 3 Sneed, 344.

So rigid is this rule, where the question is one of depriving an owner of his property under such a proceeding as a tax sale, that a verdict to the effect that the assessment was in the name of S. M. Whipple, and that the owner's name was S. B. Whipple, "is in legal effect a finding that the property was never assessed to the defendant at all" (People *vs.* Whipple, 47 Cal., 591), although generally, in proceedings less drastic, a second Christian name is immaterial, and not the subject of variance (Keene *vs.* Meade, 3 Pet., 1; State *vs.* Higgins, 27 L. R. A., 74).

So, in Crawford *vs.* Schmidt, 47 Cal., 617, an assessment to "—— Schmidt," it is held, was neither an assessment "in the name of the owner," nor to an "unknown owner," either of

which would have been sufficient, and that the assessment and sale were accordingly void.

In Corporation *vs.* Pratt, 8 Wheat., 681, 687, upon the question whether, where several lots belonging to the same owner were advertised, the advertisement should state separately the amount of the taxes due on each lot, or might simply state the aggregate amount due upon them as a whole, the court said:

"This may be a very immaterial question practically, and it may not be very easy to assign a sufficient reason of policy for the one or the other alternative. But what have we to do with such inquiries in cases of positive enactment? The law must be pursued whatever be the previous steps acquired."

(*b.*)

That the object intended to be accomplished by the statute is a cardinal consideration in its construction is, also, too elementary to be questioned; and that the object of the very common requirement in the tax laws throughout the country that the assessment, advertisement, and sale shall be in the name of the owner is that the latter may thus have the "most awakening" or effective notice before he is deprived of his property, has been, as above stated, expressly declared by this court in—

City of Washington *vs.* Pratt, *supra.*

Ronkendorff *vs.* Taylor's Lessee, 4 Pet., 349, 362.

(*c.*)

In the third place, this court, in the above-cited case of City of Washington *vs.* Pratt, 8 Wheat., 686, has declared, in terms, that, where the statute requires the assessment to be in the name of the owner, failure of the taxing officers to assess in that name is absolutely fatal to the assessment, and to any sale under it.

A most painstaking effort was made below, and is renewed at pages 78-81 of the Brief for the Kanns, to escape the effect of this plain and direct decision of the court of last resort, by seeking to discover points of difference between the two cases. These points of difference, divested of phraseology and argumentative ingenuity, amount only to this: That, in the Pratt case, the tax law covered only the case of absentees or non-resident owners; that the case arose at an early stage in the history of the city, when, as was said below, "the design of the city on paper was not completed;" that the power of sale was restricted to a single class of property, namely, unimproved lots upon which taxes were for two years in arrears, and the length of time required for the advertisement varied accordingly as the owner resided beyond the United States, or within the United States but without the limits of the District of Columbia, or within the District. No other points of difference were suggested, or exist.

The unanswerable objection to these attempted distinctions is that the decision of the court has no reference whatever to any of them, but is, in terms, founded upon the broad principle that a direction by Congress to assess the property in the name of the person "to whom it belongs" is a direction to assess in the name of the owner; that, however inconvenient or difficult it may be in some cases for the taxing officers to comply accurately with this requirement, it must be complied with in order to effect a valid sale; that the object of the requirement is to give the owner notice, in this most effective form, of the danger to his title, and that this duty, thus imposed by Congress, cannot be relaxed by the courts, but by Congress alone, if found too rigorous.

To this it is to be added, not only that this decision has never been in any instance either reversed or modified, however slightly, but that, wherever the same or a similar question has since come before the court, it has, in effect, fully reiterated the same conclusions.

Bird *vs.* Benlisa, 142 U. S., 669-70.

Marx *vs.* Hanthorn, 148 U. S., 183-4.

In Marx *vs.* Hanthorn, the language of the statute was not, as in the case at bar, specific upon the point that the assessment and advertisement must be in the name of the real owner, but the court say:

"We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes is that such notices and advertisements should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption," etc.

In the brief for the Kanns, after referring at page 71 to the act of May 15, 1820, providing that the recorder of deeds and register of wills should annually furnish the proper officer of the District with correct lists of the transfers of real property in the city of Washington, "so far as can be ascertained by the records in their respective offices," it is urged, at page 71 *et seq.*, that the assessor is not bound to go beyond what appears of record as to the title. This, however, is inconsistent with the very terms of the statute, which requires, specifically, the recorder and register to furnish correct lists, only in so far as can be ascertained from their records, without repealing or modifying the requirement that the assessment should be in the name of the owner, which requirement has been reiterated in each of the acts of Congress upon the subject subsequent to 1820.

See City of Washington *vs.* Pratt, 8 Wheat., p. 685, decided in 1823 and quoted *infra.*

(*d.*)

In the fourth place, the absolute and incurable invalidity of any assessment and sale in the name of any person other than the owner, where the law requires it to be made in the owner's name, is affirmed by the decisions to be found upon the subject throughout the various States of the Union.

The researches of the able and industrious counsel for the Kanns, at the argument below and here, discloses but two cases which they themselves consider it possible to cite as maintaining, by analogy even, a contrary doctrine. These decisions are Dickinson *vs.* Reynolds, 48 Mich., 158, and Moale *vs.* Baltimore, 61 Md., 224.

In Dickinson *vs.* Reynolds, the court, reversing a ruling below that an assessment to "the estate" of a deceased owner was invalid, does so only upon the ground that—

"the estate was at that time undivided, and the *statute*—Comp. L., sec. 976—*permitted* lands to be assessed to the heirs or devisees *without naming them.* Assessing it to the estate was, in legal effect, assessing it to unnamed heirs."

The utter want of any analogy between the law of that case and of the case at bar, or between the facts of the two cases, is apparent. In the Michigan case, the land was undivided, and the law, in terms, permitted it to be assessed to the unnamed heirs; while, in the case at bar, the land had been for twenty-five years in the possession and fee-simple ownership, in severalty, of Mrs. Kennedy, and the law under such circumstances required it to be assessed in the name of the owner. In the Michigan case, the assessment was to "the estate" of the deceased former owner, a form of assessment held by the court to be in legal effect an assessment to the unnamed heirs, which the law authorized; while in the case at bar the assessment was to "Maria T. Gillis," which could by no possibility be treated as in legal effect an assessment to the estate of the deceased owner, even if the statute here were the same as in Michigan.

The Maryland case, Moale *vs.* Baltimore, was a suit, not to determine the validity of a sale, but to enjoin a sale for a special improvement tax. It was not the case of an attempt to deprive the owner of his property by a tax sale conducted without giving him the notice or warning required by law, but a suit by the owners, before sale, and disclosing notice and full knowledge, on their part, of its

danger, the object being to relieve themselves of their obligation to pay their just proportion of a special improvement tax, not upon any meritorious ground, but solely because the assessment had been to the estate of the ancestor from whom they had inherited the property, instead of in their individual names.

It is manifest that neither of these two cases affords any support to the validity of a sale, already made without the owner's knowledge, and without the notice to him required by the statute; and, as stated, they are the only two to which the learning and diligence of counsel have led them, capable, argumentatively even, of being presented to the court as analogous. On the other hand, the text books and the reports abound in decisions, without exception uniform and harmonious, to the effect that a sale under such circumstances is absolutely void. We shall cite only such as are analogous to the case at bar in a particular which was urged below as properly distinguishing it from cases of assessment in erroneous names generally, namely, cases in which the assessment was made in the name of a former but deceased owner.

In L'Engle *vs.* Wilson, 21 Fla., 461, the tax deed was based upon an assessment to "Estate of C. Parkhurst," Parkhurst being then dead and the property in the possession and hands of his executor. *Held*, that this was not an assessment to the "owner, occupant, unknown owner or person in a representative capacity," as provided by the statute, and that the tax sale was therefore void. This case is cited by this court in the case of Bird *vs.* Benlisa, 142 U. S., 664.

So, in L'Engle *vs.* Railroad Co., 21 Fla., 358-9, also cited in Bird *vs.* Benlisa, the court says:

"The tax is a lien on the land *only when legally assessed*. 'The lien attaches and has relation to the time at which the assessment was made.' 18 Fla., 289, Spratt *vs.* Price. We hold that a valid assessment of the land in accordance with the laws regulating the assessments, chap. 3099, Laws of Fla., Acts of 1879, is necessary and indispensable to make

good the title of a purchaser at a tax sale; without such assessment, no lien attaches to the land. An assessment, therefore, to a person other than the owner, such person not being the occupant thereof, is not a valid assessment, and the purchaser at a tax sale based on such assessment takes no title."

In Fix *vs.* Dierker, 30 La. Ann., 175, the assessment was in the name of a deceased husband and father. It did not appear that he had ever been the owner; but it did appear that upon his death his property, if he owned any, had passed to his legal representatives. *Held,* that, there having been, in either event, no assessment against the true owner, the tax sale was void.

In Smith vs. Davis, 30 Cal., 536, the statutory provision was that the assessment should show "the name of the owner of each lot or portion of a lot assessed, if known, or if unknown, to be so stated." The assessment was in the name of D. C. Broderick, who had been the owner, but had been dead for several years. The report of the case shows that the assessor knew of Broderick's death, though, of course, the right to have notice by advertisement in the owner's name could not be varied or made to depend upon the personal knowledge or ignorance of the assessors. The court, after stating that a dead man could not be the owner, adds:

"That such an assessment imposed no obligation upon the defendant is too plain for argument. He can be made to pay only upon its being shown that the steps of the statute *have been strictly followed.* * * * An assessment to a person long since dead, or to a person not the owner, is not in any sense a compliance with the statutory mode, and is therefore without any binding force."

In Sharpe *vs.* Spier, 4 Hill, 76, 89, the action was ejectment to recover land which one John Sharpe had conveyed to his mother, who had died leaving him her only heir-at-law, and had devised all her property to his children. The

tax was assessed in her name, she having died only two years before the assessment. The court said:

"At the time these proceedings were commenced, the land belonged to the seven minor grandchildren of Mary Sharpe, who are the plaintiffs in this action. The fact that Mrs. Sharpe has been long dead enabled the collector to make the necessary affidavit that she could not 'upon diligent inquiry be found in said village.' Had the plaintiffs, the owners of the land, been named in the assessment, there is no reason to suppose that the necessary affidavit could have been made, or that the tax would not have been paid, and the land saved. The assessment neither created a charge on the land, nor a debt or duty upon the plaintiffs. * * * On each and all of these grounds we are of opinion that the sale was void, and conferred no title on the purchaser."

In Whitney *vs.* Thomas, 23 N. Y., p. 285, it was urged that if the assessors made inquiries and assessed according to the best information they could obtain, their action was judicial and could not be impeached in any collateral proceeding. This the court declared to be erroneous. "The assessors have no jurisdiction to assess except as the statute prescribed; and, unless they pursue the directions of statute, the assessment is unauthorized and void."

So, in the case at bar, it is urged that, if the land was assessed in the name of the last record owner, it should be held sufficient; but this position is wholly untenable. The statutory requirement is that, except only in the case of property belonging to an undivided estate and which has been divided according to law or come otherwise into the possession of the owner, and except in the case of an unknown owner, in which case the land must be assesed "owner unknown," the assessment shall be in the name of the owner.

The statute declares that all real property shall be assessed in the name of the owner or trustee or trustees of the owner thereof. The proposition of the defendants is to substitute for this language of the act the following: "All real prop-

erty shall be assessed in the name of the *last record* owner." The proposition, to be refuted, needs but to be stated.

The exception to the exception contained in the act, namely, the case of property which has come into the possession of one otherwise than by legal division of a decedent's estate, shows that Congress recognized, and intended to provide for, cases of ownership not evidenced by usual legal procedure. This court had declared, repeatedly, that a title by adverse possession, for example, was as legally perfect and complete as if obtained through a deed from the last record owner.

Harpending *vs.* Dutch Church, 16 Pet., 492.
Leffingwell *vs.* Warren, 2 Black, 599.
And see Dicherson *vs.* Colgrove, 100 U. S., 583.

The courts of this District have repeatedly permitted recoveries in ejectment upon such titles, and have sustained them as valid defenses to suits brought by the holders of the record title, contrary to the view urged below that a record title is in all cases sufficient to enable the holder to recover in ejectment, and that purchasers for value are permitted to rely upon the record as to the ownership of real property. The position contended for, namely, that assessment in the name of the last record owner is the only requirement of the provision that *all* real property shall be assessed in the name of the owner or trustee or trustees of the owner thereof, would deprive that considerable number of persons who hold valuable real estate by adverse possessory titles and the like of that warning by assessment and advertisement in their own names which this court declares was the object of the statute. Indeed, the argument here is that every person who happens to be the sole heir of a deceased owner of real estate should be so proved and for all time, notwithstanding the express letter of the law, and its plain object and meaning as declared by this court (Brief for Kanns, pp. 71-3).

In Wood *vs.* Torrey, 97 Mass., 322–3, the statute authorized the assessment of personal taxes against the owner, or, in case of his decease, generally against his estate, until the appointment of an executor or administrator, and, after such appointment, to the executor or administrator until that officer should give notice of distribution. The defendant was made administrator in 1863, and the assessment was made in 1864 to "Estate of Benjamin Davenport," the testator. It was held utterly void. This, it is true, was a case of tax on personalty, but the reasoning and principle are the same.

In State *vs.* Collector of Jersey City, 24 N. J. L., 108, the proceeding was to vacate by *certiorari* an assessment to "Estate of J. B. Coles." The statute prohibited relief "for any lack of form which does not impair the substantial rights of the plaintiffs." The court held that the relief prayed must be denied, under this provision of the statute, because, as the tax could not be collected of the heirs personally, owing to the defective assessment, and because no good title to their land could be made by the sale under it, their substantial rights were not impaired.

In Cruger *vs.* Dougherty, 43 N. Y., 107, 118–20, the assessment was against "John Kortright, other legal heirs of John Kortright, deceased, or their heirs or assigns." The John Kortright thus named was a son of "John Kortright, deceased," and had himself been dead for five years before the assessment. The court said:

"Is the statement made here any better than if none had been made as to the names of the persons? * * * It cannot be pretended that it was sufficient to name him who had been dead five years."

To similar effect is Carlisle *vs.* State, 78 Ala., 486.

In Sawyer *vs.* Mackie, 149 Mass., 269, all proceedings necessary to the validity of the tax deeds in controversy were complied with except in regard to the name in which the assessments were made, the assessment being in the name

of John O. Bradford, who had owned the property for about seventeen years prior to his death. At the date of the assessment there was no record of his death, no probate proceedings had been instituted upon his estate, no evidence that the assessors had notice of his death, the title stood in his name upon the records of the office of the register of deeds, and the statute provided that, for purposes of assessing and collecting taxes, the persons appearing of record as owners should be held to be the true owners thereof. The court, at page 270, say:

"The natural and obvious meaning of the word 'person' is, living human being. When the statutes speak of a person who has died, they speak of him as a 'person deceased' or a 'deceased person.' A dead man cannot be an owner of property. We see no reason to suppose that the statute above cited intends to use the words 'persons' and 'owners' in any other than the usual sense. * * * We are, therefore, of opinion that the assessment of the taxes upon the premises in question for the years 1884 and 1885 to J. O. Bradford, who died in 1879, was illegal, and that the spperior court rightly directed the verdict for the tenant."

In the light of the authority last cited, the contention of the appellants that the payment of former assessments for many years in the name of Maria T. Gillis is in the nature of an estoppel cannot stand. So in Cruger *vs.* Dougherty, 43 N. Y., 107, 118–20, the court say:

"It is also urged that these persons are estopped from questioning this tax now, because they have been assessed in this form for eighteen years prior to this assessment, and have always paid it. The payment of a tax for any number of years without legal proceedings, will not give validity to such proceedings when they are questioned, if taken without authority of law."

Still less is such an objection tenable as against the complainant in this case, who had but recently acquired the lease, and whose interest is sought to be sacrificed through

the instrumentality of this tax proceeding. How is she estopped?

In the case at bar, it will be noted, not even the position of the defeated tax claimants in a majority of the foregoing cases is presented. The assessment in this case is not to the estate nor to the heirs of a deceased person, but to *Maria T. Gillis*, the bill alleging, the answers admitting, and the evidence showing that Marianne A. B. Kennedy had been for more than twenty-five years the fee-simple owner, in severalty and in possession for thirty-one years, to be exact (Kanns' Brief, p. 73).

So far from *record* notice of a change of ownership being essential, for any purpose, Mrs. Kennedy's possession would have been sufficient, even as against an innocent purchaser from a record owner, without notice (U. S. *vs.* Howgate, 2 Mack., 408).

Even had it been claimed in the pleadings, or in the evidence, that the assessors made a *bona fide* attempt to obtain the name of the actual owner, and had been unable to do so, it would have availed nothing. No attempt is made to show such an effort, and the Brief for the Kanns, at page 71, contents itself with the claim that none was necessary; but, if shown, it would have been wholly immaterial. Where the statute requires the name of the owner to be stated the requirement must be complied with:

"It was undoubtedly in the power of Congress to have left what latitude they pleased to the assessor in designating the owner; but, if they have confined him to the necessity of determining the true owner, it is not in our power to enlarge his discretion. It may be a hardship upon the corporation, but the legislature only can decide whether that hardship shall be perpetuated or not. * * * Had Congress intended to lighten the labors of the corporation, or their assessor, in this respect, there were very simple means of doing it; they might have sanctioned a designation with respect to the first or last vendee of record" (City of Washington *vs.* Pratt, 8 Wheat., 685).

And yet, at page 71 of the Brief for the Kanns, this is precisely what is now claimed to be the law, *without* such an act of Congress.

This decision in City of Washington *vs.* Pratt was in 1823; and, as must be assumed, with knowledge of the law as thus declared by this court, Congress has perpetuated the requirement in question, down to the present time.

In Desmond *vs.* Babbitt, 117 Mass., 233, 234, in which case the assessment was made in the name of one who had been the owner until about four years previously, the court said:

"If, with reasonable diligence, they cannot obtain trustworthy information, they would be justified as taxing it as the property of the unknown proprietor; but they would not thereby acquire the right to tax it to a person by name who was neither the owner nor the occupant."

So in *Ex parte* Thacher, 3 Sneed, 344, in which case the collector had reported his inability to ascertain the owner, and, there being no statutory authority to assess in the name of the unknown owner, the court said:

"This statute is imperative, and its meaning cannot be misunderstood. To give validity to the proceeding, it is essential that its requirements should be complied with. As the statute has not made an exception, authorizing the omission of the name of 'the person to whom granted, or in whose name entered' (either would be sufficient), or the number of the town lot, where these facts are not within the knowledge of the collector, the court can make none. Should it be thought necessary to dispense with these requirements, the legislature has the power to do so; the court has not."

2.

THE FAILURE TO FILE THE COLLECTOR'S REPORT.

In the second place, under the present subdivision of this brief, it is submitted that the tax sale is invalid because of

the failure of the collector of taxes to file his report of the sale in the office of the recorder of deeds, as required by law. Such a filing, contrary to the claim at page 95 of the Brief of Kanns, is a prerequisite to the validity of the sale, and although a condition subsequent to its fulfillment, is as necessary as that of conditions precedent to the act, in order to validate the sale (Blackwell on Tax Titles, secs. 641, 644, 653, and citations; King *vs.* District of Columbia, MacA. & Mackey 36; Beale *vs.* Brown, 6 Mackey, 574, 578–9; Sumner *vs.* Sherman, 13 Vt., 609; Giddings *vs.* Smith, 15 Vt., 344, 357; Carpenter *vs.* Sawyer, 17 Vt., 121–124; Judevine *vs.* Jackson, 18 Vt., 470, 472).

"That this portion of the statute should be strictly complied with, in order to protect the title under sale, from the course of decisions on this subject there can be no doubt" (Lane *vs.* James, 25 Vt., 481, 486).

"For the purpose of giving effect to the deed, and vesting the title, the filing of the report must be treated as a condition precedent (citations). The purchaser is bound to see that the law has been complied with, and the report cannot now, after the period of redemption has expired, be amended" (Jenkinson *vs.* The Auditor, 104 Mich., 34, 37).

"He who wishes to obtain an estate worth $1,000 for less than $10.00, under and by virtue of the law, is not to be permitted to ask why he should be required to do this or to do that. It is an answer that it is required by law. *Ita lex scripta est.* He claims by the law, then by that law let his pretensions be judged" (Reed *vs.* Morten, 9 Mo., 879; Donohoe *vs.* Hartless, 33 Mo., 335, 336).

The filing of the report is, therefore, a condition precedent to the validity of the sale, and this requirement of the law is not complied with by temporarily depositing the report with the recorder of deeds and subsequently taking it away again—long prior to the expiration of the time allowed by law for redemption from tax sales (Record, pp. 229, 471).

A paper is "filed" when it is delivered to the proper officer and by him received to be kept on file (Bouv. Law. Dict. and citations).

A leading case upon the subject is Medland *vs.* Linton, 60 Neb., 249. The statute requiring the treasurer to file in the office of the county clerk of his county a report or return of tax sales made by him, and the treasurer having attempted compliance with this requirement by taking the return to the office of the county clerk, and afterwards receiving it from that officer and taking it back to his own office, the court said:

"This in our judgment is, neither in letter nor spirit, a compliance with the sections of the statute referred to. * * * The law requires that this return, or report, shall be filed in the office of the county clerk. * * * 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file' (Bouv. Law Dict.), and the derivation and meaning of the word, as defined in the dictionaries, carries with it the idea of permanent preservation; becoming a part of the permanent records of the public office where it is filed.

"Filing a paper, *ex vi termini*, means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of filing, and not the filing itself. Where the paper is required to be filed only for a specific purpose, or to remain on file for only a limited time, the special or limited character of such filing is usually indicated by the statute. Thus in par. 31, chap. 31, of the R. S., entitled, Conveyance, deeds and other instruments relating to lands are spoken of as being 'filed for record.' There the filing is for the mere purpose of being recorded; when that is accomplished the instrument may be properly withdrawn from the files."

To like effect is Gorham *vs.* Summers, 25 Minn., 81, 83; People *vs.* Peck, 67 Hun., 560; Wingfield's Adjudged Words and Phrases, 261, 262.

It is respectfully submitted that for no purpose, and still less for the purpose of compliance with the rigid requirements of the law in respect to tax sales, can either the depositing and withdrawing of this paper from the office of the recorder of deeds, where the law directed it to be "filed," nor the disconnected, fragmentary, uncertified, and unintel-

ligible copy of it assumed to be made in the office of the recorder of deeds, without legal warrant, be regarded as sufficient.

The claim first made in the Court of Appeals, that the bill does not allege the withdrawal of the report from the recorder's office, is without merit. The bill (Record, p. 10) alleges that the law required the report to be filed with the recorder of deeds, and that *the only report* was the fragmentary entries in the three Libers specified, which, apart from the irregularities pointed out, the complainant would not concede to be a valid, legal report.

3.

THE DEFECTIVE CHARACTER OF THE REPORT.

In the third place, in the present connection, the report, even if filed as required by law, is fatally defective in the following particulars:

(*a.*) If the alleged copy of the report, made by the recorder of deeds as above set out, can be considered as the report, it is invalid, because separated into three portions, copied into Libers which are not consecutive, the second of them, containing the only reference to the property in controversy, being without any certificate of its character, or of reference to the first Liber containing such certificate, or of any entry connecting it with the first Liber, except a memorandum at the top of the page, "Real-estate tax sale, District of Columbia, April 12 to 19, 1899." Other than this, there is no certificate or explanation whatsoever, and what is actually the import or meaning of the contents of the second Liber, as of the third, is left wholly to conjecture and inference—the law being that, in cases of this character, nothing must be left to conjecture or inference.

Thus, in Woods *vs.* Freeman, 1 Wall., 388, numerals in a column, intended to indicate money but without a dollar

mark or other indication plainly denoting it, were held insufficient, and the tax sale void; and to like effect are Lawrence *vs.* Fast, 20 Ill., 340, 342; Lane *vs.* Bommelmann, 21 Ill., 147. This defect, also, exists in the present case (Record, pp. 160–1).

The proof in respect to compliance with the requirements of the law in the matter of tax sales "must be affirmative and certain, and not left to conjecture and inference" (County Commissioners *vs.* Clark, 36 Md., 206).

Abbreviations made and understood by the persons in the tax and probate offices, who made up the tax list, are insufficient. There must be no vagueness (Smith *vs.* Cox, 150 Ala., 503, 509; Keane *vs.* Canovan, 21 Cal., 291, 302-3, Field, C. J.).

A book in the required office of the court, under the caption "Lands sold for taxes, January 3, A. D. 1876," without signature, certificate, or authentication by the sheriff, is insufficient (Mason *vs.* Banks, 59 Miss., 447, 449). In this case, the law required a list "certified by the collector," while in the case at bar the requirement is that the collector shall "give a statement," etc.; and, as stated, there is nothing in the Liber referring to sublot A, square 432, to show that the statement is made by the collector, or by any other person, nor is there a reference to any other Liber or record showing such fact.

The statute providing for the filing of the collector's report with the recorder of deeds, approved February 28, 1898 (30 U. S. Stats. at L., 250, 252), under which this sale was assumed to be made, requires that it shall state the following:

(*b.*) To whom the property was assessed. As will be seen by reference to the copy of the report in evidence (Record, p. 234), this requirement is not complied with, except inferentially and conjecturally, which, as above shown, is insufficient in the case of tax sales.

(*c.*) The taxes due. As to this requirement the report is wholly silent.

(*d.*) To whom sold. As to this requirement, under a column headed "Purchaser," the report contains only the word "Do." As to the first piece of property described on the page, the name "C. H. Wiltsie" appears in the column. As to the second piece sold, there is only the word "Do." As to the third piece sold, "Do." again appears as the purchaser. As to the fourth piece of property sold, "C. H. Wiltsie" appears in the purchaser's column, and as to the remaining piece, "Do." That "Do." does not stand for C. H. Wiltsie would seem to be apparent from the fact that where Wiltsie is purchaser his name appears in full, unless "Do." and "C. H. Wiltsie" are intended to represent, indifferently, Mr. Wiltsie, as to which we can resort only to the sources of information excluded by the authorities above referred to, namely, inference and conjecture.

It is to be assumed that the purpose of requiring the collector to set forth the name of the purchaser, or at least one of the principal purposes, was to enable the owner to ascertain who had bought his property, and to redeem it from such purchaser. The entry, as contained in the report, gives no information.

(*e.*) The amount paid. As to this requirement, also, there is an entire failure of compliance with the statute. Under the column headed "Amount sold for" appear "128 50" as the "2. half tax for year 1898"; "14 13" as "penalty," and "1 20" as "advertising." From which we may perhaps conjecture or infer that it would have required the sum of these items, "143 83," to discharge the claims of the District authorities; but whether the property was sold for this sum or for a larger or a smaller one, and whether "143 83" means $143.83, the report is entirely silent.

(*f.*) The date of sale. As to this item, also, the report gives no information. It does inferentially, perhaps, indicate that the first property referred to on the page in question was sold on April 13; but whether the remaining pieces

of property upon that page were sold on that day, or upon some other, is not disclosed.

(*g.*) The cost of sale. Here, too, except that the advertising fee is indicated to have been "1 20," the report is destitute of information. What other items of costs there were, or what was the total cost, is left in darkness.

(*h.*) The surplus, if any. As in all preceding particulars, the report is wholly silent as to whether there was or was not a surplus; nor, in view of the omission to state the amount for which the property was sold, and the cost of the sale, is any data supplied by which the owner, or the public, could determine whether there was or was not a surplus.

That these omissions are fatal is clear, not only upon the general principles already discussed and supported by the authorities cited, but by specific decisions of the courts.

Where the return was required by the statute to show the "estate held, the name of the county, the month and the year of the sale," but it omitted those items, the court said:

"This act of the legislature prescribed the terms upon which realty may be sold for taxes and the owner divested of his title. Should not every positive requirement of it be regarded as material, to be strictly complied with? * * * There would seem to be but one answer to this question. If he [the officer conducting the sale] can omit any positive requirement of the statute, he may omit all, and thereby arbitrarily divest any owner of his title to realty in arrears for taxes" (De Forest *vs.* Thompson, 40 Fed. Rep., 375; Brackstone *vs.* Rich, 47 Fed. Rep., 178, 190).

"If there are omitted from the list some of the positive requirements of the statute, can it be called a mere irregularity which will not affect the sale? To say that the legislature has enacted that certain proceedings are necessary to the validity of a sale of real estate for taxes, and at the same time to say that omission of any of such proceedings is mere irregularity, is absurd. If any of such proceedings may be omitted, why not all? How can we say which is material

and which is not? The legislature prescribes the rule, not the court; and we must regard all the requirements of the statute alike essential" (Jones *vs.* Dils, 18 W. Va., 759).

The defects above enumerated appear in the copy of the report as transcribed into the records of the office of the recorder of deeds (Record, p. 234). With the exception of defect *a*, they appear equally in the report itself, withdrawn from that office by the collector and now in his possession (Record, p. 160).

The Court of Appeals held the invalidity of the tax deed to be so clear from the fact that the assessment and sale were in the name of another than the owner, and from the failure of the report of the sale to state the amount of taxes due, the cost of the sale or the amount for which it was made, that it was unnecessary to consider, even, any of the remaining objections to its validity (Record, pp. 489-90), and, we submit, was unquestionably correct in so holding. It follows, as the court further held, that the matter stands as though the tax certificate and deed had never been issued.

"The situation, therefore, is that there are taxes upon the property in arrears, due and unpaid, for which the lessee is liable, and for the failure to pay which the lessor seeks to enforce a forfeiture of the lease. And the lessee, claiming that the failure to pay at the proper time was an inadvertence or misadventure, offers to pay them, and seeks to be relieved from the forfeiture or threatened forfeiture."

And the court, at page 491, then proceeds to point out, not only that the default occurred when the lessee was in the midst of bereavement and financial trouble and distress caused by and accompanying the death of her husband, but adds that, as shown by the statement of facts prefacing this brief, the lessor was as responsible as the lessee, if not more so, for that default.

"The testimony shows quite conclusively that, while the lease required the annual taxes on his property to be paid by

the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes for the second half of the year 1898, in connection with which the default occurred, the lessor, for some reason, failed to make the usual demand for the money wherewith to pay the taxes. * * * The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to any party by her relief from the nominal forfeiture which she has incurred."

II.

The invalidity of the tax deed seems so manifest that little time will be devoted to the further question whether, if valid, the circumstances under and the purposes for which it was acquired are not such as, in a court of equity, to preclude the appellants in case No. 202 from asserting it, and to entitle the appellee and the appellant Webb to relief against it.

While the fact that there had been a tax sale was first communicated to the Kanns, and by them to Cohen, through a tax practitioner, Knight, the information thus given was simply that there had been a tax sale, and not that the sale had become irredeemable by lapse of time. It was "a bare statement of something that might be true, and might not be true, and I [Cohen] was not going to meddle with it at all" (Record, p. 381). The fact that the tax sale was irredeemable was acquired from Mr. Webb by Mr. Cohen on September 30 (Record, p. 381), and it was this information which led him to conceive the idea of purchasing the tax certificate as a "club that I might use, as necessary, as against either Mrs. Kennedy or Mrs. King" (Record, p. 382), being aware of the fact that the tax sale certificate would not be a club over the head of any one except for the fact that it had become irredeemable (Record, p. 382).

The law applicable to this evidence in the case is thus laid down by this court in Michoud *vs.* Girod, 4 How., 554:

"Trustees (unless they are nominally such to preserve contingent remainders), agents, commissioners, creditors who have been consulted as to the mode of sale, *and any persons* who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property, excepting under restraints which shortly will be mentioned"—

the exceptions referred to having no application to the facts of the present case.

The information thus derived from Mr. Webb of the irredeemability of the tax certificate was obtained from him in the negotiation for the proposed lease from Mrs. Kennedy to the Kanns, and after Mr. Cohen had informed Mr. Webb that his clients, the Kanns, would take the lease (Record, pp. 381-2). It was only upon the information obtained from Mr. Webb that the tax certificate was irredeemable, and that Mr. Wiltsie held it, that he conceived the idea of purchasing this tax title, "because of the fact that I wished to be in possession of a club that I could use, as necessary, against either Mrs. Kennedy or Mrs. King," and he believed that the certificate was a club, or would prove so, because it was irredeemable (Record, p. 382). The provision of the lease for forfeiture if the taxes were not paid, he testifies he knew long prior to September 30, though declaring himself unable to state how he knew it (Record, p. 389), the only opportunity or occasion for acquiring such knowledge, in so far as the record discloses, being the fact that the original lease had been acknowledged before him, and the several extensions of it drawn by members of his law firm (Record, pp. 389-92), which firm were never attorneys for the lessor (Record, p. 391), but had been attorneys for the lessee in various matters, including the extensions of the lease in controversy (Record, p. 423).

As pointed out in the statement of facts at the beginning of this brief, the anticipated necessity for a "club" arose from the fact that on a former occasion Mrs. Kennedy had at the

instance of her tenants receded from some concessions which she had promised the Kanns in regard to the property, and it was to prevent any relenting in favor of the Kings in the matter of forfeiture that the club was to be utilized (Record, p. 423); and, when it was learned from Mr. Webb, on October 8, that Mrs. Kennedy had relented and was intending to allow the Kings to continue in possession (Record, p. 414), the club was put into commission or exercise on the following day (Record, pp. 408-9) by the announcement to her representative that, if she did not eject the Kings and give the Kanns a lease, the tax title would be held adversely, that she must take the consequences, and that her property might be taken from her (Record, p. 319); and it was with this club in hand that Mrs. King was asked to acquiesce in a judgment by default against her for possession of the property, in favor of the Kanns, upon terms of money being left upon a table or elsewhere which might be "found" by her attorney, thus avoiding the difficulty created by the then pending equity suit to subject the lease to payment of her husband's creditors.

At pages 166-7 of the brief of appellant in No. 203, the cross-examination of Mr. Webb to elicit the fact that the irredeemability of the tax title was communicated by him to Mr. Cohen, his deposition having preceded that of the latter, is declared to be irrelevant, that this information was only what Mr. Cohen might have obtained from the public records, and included nothing which he did not subsequently verify at the office of the title company. But, however accessible from other sources may have been this information which led Mr. Cohen to conceive the plan of purchasing the tax title, for the purpose so picturesquely and candidly described by him, the fact remains, as testified by himself, that the plan *was* conceived in consequence of the information given him by Mr. Webb in the negotiation for the lease and after he had informed Mr. Webb that his client would take it, that the tax title had become irredeemable, without which

circumstance he knew it would not be available as a club (Record, pp. 381-4). No such suggestion had been conveyed to his mind by the information from Mr. Knight of the mere fact that the property had been sold for taxes (Record, p. 380), although he had "been for some time trying to get a lease of these premises for the Kanns," and though his purchase of the tax title, after learning of its irredeemability, was with the expectation of forcing the Kings out of the property and of being able to put the Kanns into possession of it.

"Q. * * * I ask you once more if it is not true that the fact which conveyed to your mind that this tax certificate would be a club over Mrs. Kennedy's head first came to you through Mr. Webb's informing you that the tax certificate was irredeemable? A. I have stated again and again that the fact of the irredeemability of this tax certificate came to me from Mr. Webb, and I repeat it.

"Q. It came to you in a treaty between you and him for a lease from his client to your client. Is that true? A. That depends upon your use of the word treaty.

"Q. Call it negotiation. We are not splitting words here. A. It came to me as a statement from Mr. Webb after I had informed him that my client would take the property at $300.00 per month.

"Q. It came to you from him in the course of negotiations between you for a lease to your client from his client, did it not? A. If you call them negotiations, yes, sir.

"Q. Is it possible for you to say yes or no to that question? A. I think the proper answer to that question is yes" (Record, pp. 383-4).

No authority, it is believed, has ever existed for the proposition that information, thus obtained, can be taken advantage of for the purpose of purchasing a title adverse to that of him from whom it was obtained, on the ground that the same information might have been, but was not, gotten from public records or other sources, if it had occurred to the party to seek it there; and, if so, not only is the fact thus proved not open to the charge of being irrelevant, but it strongly—

it is submitted, conclusively—defends against the tax purchase of title to the property which the appellant in No. 203 is charged with the duty of defending, and in performance of which duty, ordinarily, it would be reasonable to expect to find him engaged. The claim in his brief that the tax title was gotten out of the way by a compromise of October 9, 1901, would seem to be distinctly denied by the answers (Record, pp. 46, 48, 68, 68-9, 69, 81), and by the appeal throughout the case by and on behalf of the appellant Webb that the complainant should not be permitted to compel him to jeopardize the title to this valuable property by being granted the restraining order *pendente lite*, and later the injunction, which would prevent him from saving the property by acceptance of terms then available, but which otherwise might be irretrievably lost, which arguments against the relief prayed are reiterated, even in this court of last resort, whose decision will forever put an end to all possible jeopardy, if any exist, in the Brief for Kanns, pages 62-3.

"This defendant deems it of the highest importance that we should not imperil the estate of his testatrix by litigation touching the validity of said tax sale, when he is able to secure an amicable compromise of the claims of the owners of the tax title without loss or injury to the said estate" (Webb's answer, Record, p. 84).

This was the burden of the argument on his behalf throughout the lower courts, although, if the statement of his brief is correct, the compromise which the answer represents him as then "able to secure" had already been secured, and the tax title "gotten out of the way," six months and more before his answer was filed. Upon the representations of his answer and on his behalf at the argument, the court felt bound to require the appellee to give, as the condition of the necessary injunction *pendente lite*, a bond for $40,000, to protect the title represented by the said appellant against the tax title (Record, pp. 106-8), which, it is now stated, had already been compromised and gotten out of the way. And

yet, if the statement in the brief should be regarded as an inaccurate one, we are confronted with the apparently equally inexplicable condition that the appellant has, as is further stated in his brief (p. 183), thereafter "consistently acted with the Kanns and their counsel," and is here contesting the jurisdiction or power of the courts below to render the decree which annuls the tax deed, and frees his title from its alleged peril (Brief for Webb, pp. 89-91).

III.

The charge of multifariousness, it is submitted, is equally untenable. The bill raised no question which did not concern, directly and immediately, each and every of the defendants. The defendant Webb was insisting, not alone upon his right to claim the forfeiture, but that the tax title, which he claimed had accrued through the negligence of the complainant, was a bar to the relief sought by her. The other defendants were claiming, not only that they had secured a title to the property through the tax deed, but that they had, in addition thereto, an agreement for a lease from the complainant's lessor. All were therefore directly interested in both the purposes of the bill, namely, the vacation of the tax title and relief against the forfeiture. Whether the tax sale was valid was a question in which the defendant Webb was vitally interested, and if it were invalid, then his codefendants were equally interested with him in the question whether the forfeiture should be relieved against and the agreement for a lease to them by Mr. Webb's testatrix thereby defeated. As to the appellee, the tax title, if valid, defeated her unexpired term, while if invalid it nevertheless constituted a cloud upon it, which it was within the plain jurisdiction of a court of equity to remove, as well as an ostensible obstacle to her relief against the forfeiture.

The untenableness of this objection is apparent from other points of view, showing the Kanns to have been not only

proper, but absolutely necessary parties to the bill, upon its merits. The rules of equity pleading require that the bill must anticipate and answer all defenses either originally or, if this has not been done, then by way of amendment to the bill. If, therefore, appellee's bill had alleged, simply, the fact that her omission to pay the taxes in question was an unintentional slip, the result of accident and mistake leaving the appellant Webb, by way of answer, to set up the tax sale and the resulting tax deed in the hands of Cohen and the Kanns, it is obvious that this would have been an obstacle to relief, had the pleadings ended there. It would have been indispensable, in such a case, for the appellee to obtain leave to amend her bill, and to show that the tax sale and deed were absolute nullities, interposing no real obstacle to the relief asked. To do in the first instance what otherwise she must have done later by amendment cannot constitute multifariousness.

Multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, even though their interests may have arisen under distinct contracts.

Gaines *vs.* Chew, 2 How., 619, 642.

See also:

Oliver *vs.* Piatt, 3 How., 411-12.
Barney *vs.* Latham, 103 U. S., 214-15.
Payne *vs.* Hook, 7 Wall., 432-3.

If the case against one defendant is so entire as to be incapable of being prosecuted in several suits, the objection of multifariousness cannot be allowed to prevail because some other defendant may be a necessary party to some portion of the case stated. It will be sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others (Brown *vs.* Guaranty

Trust Co., 128 U. S., 412). All parties whose rights or interests would be affected must be made parties.

Hoe *vs.* Wilson, 9 Wall., 501.

McArthur *vs.* Scott, 113 U. S., 391-2.

The appellants Cohen and Kanns are not only affected by so much of the decree below as declares their tax title invalid, but are "equally, though indirectly, injured by the portion of the decree which relieves from and enjoins the forfeiture and prohibits the re-entry of the lessor, because thereby the lessor is prevented from giving a lease to the appellants and carrying out the terms of the compromise" (Brief for Kanns, pp. 17-18). How, then, are they unnecessary parties, or the bill multifarious?

From still another point of view the objection of multifariousness must fail. It would have been contrary to the principles of equity to adjudge, in a suit between appellee and the appellant Webb alone, that the tax title was invalid, and therefore no obstacle to relief, because the decree would have been without effect as against the holders of the tax title, and would have left appellant Webb exposed to the costs and risk of further and independent litigation with them over the same question.

Persons having an interest in the controversy, and who must be made parties to enable the court to act on the rule which requires it to decide upon and finally determine the entire controversy, and to do complete justice by adjusting all the rights involved in it, are necessary parties.

California *vs.* Southern Pacific Co., 157 U. S., 249, 251.

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject of the suit, so as to make the performance of the award of the court perfectly safe to those who are compelled to obey it, and to prevent further litigation."

1 Dan'l Ch. Pl. & Pr. (4th ed.), p. 190, cited and approved in California *vs.* Southern Pac. Co., *supra*.

IV.

The fourth of the above propositions, it is conceived, requires slight discussion. The tax sale took place, under the circumstances before stated, on April 13, 1899, and the tax purchaser gave no notice of it until the two years allowed by law for redemption had expired. He first brought the matter to the attention of the appellee by his letter of July 24, 1901, followed by the correspondence, at pages 55-7 of the record, between that date and September 24, on which date Mr. Wiltsie's original demand of $294.31 for a tax certificate which cost him $143.83 had been reduced only to the sum of $272.90, or nearly 100 per cent. more than he had paid. The appellee, under advice from her counsel that the tax deed was wholly void, had offered $247.90, and it was at this stage of the case that Mr. Cohen intervened, paid $200 more than Mr. Wiltsie told him he had asked, and acquired the certificate for $500. The negotiation, it will be seen, had extended, in all, a little over two months, with no possible ground to anticipate the course pursued by the appellants, or any of them, and under both an assurance from counsel that the tax sale was a nullity, and a not unnatural reluctance to submit to what was deemed a gross imposition, irrespective of the amount involved. No evidence has been lost, and no conditions have changed, except in so far as appellants themselves have changed them. The natural repugnance aroused by Wiltsie's attempted imposition and demands, in the breast of the appellant Webb himself, or of his counsel, will appear at page 176 of his brief.

We submit that the lower court was justified in its holding that there was no such "delay or laches by appellee as would preclude her from relief in equity," and that the delay, under such circumstances, cannot be held "wholly unreasonable in view of the fact that she had been advised that the sale for taxes was invalid."

V.

The objection most strenuously urged on behalf of the appellant Webb is that the jurisdiction of equity to relieve against forfeitures does not extend to cases where the covenant broken is for the performance of a collateral act, as distinguished from the payment of rent or the like, and that the payment of taxes is such a collateral act.

In the first place, it must be noted that this entire controversy has grown out of the omission of the appellant Webb, or of his client, Mrs. Kennedy, whom the record shows to have largely followed his guidance, to make demand for payment of the taxes before declaring or attempting forfeiture. Of the authorities cited below for the claim that no demand was necessary, Ricou *vs.* Hart, 48 La. Ann., 1370, turned upon the law of that State, making no demand necessary even in the case of rent (Van Rensselaer *vs.* Holbroke, 1 La. Ann., 180); Baldwin *vs.* Rees (Ohio), 8 Am. Rec., 556, is questioned in the later case of Eichenlaub *vs.* Neil, 3 Ohio Dec., 365; and Garner *vs.* Hannah, 6 Duer. 272, 273, while holding that the landlord may have judgment for the forfeiture without prior demand, declares it nevertheless "perfectly clear" that the tenant will be entitled, notwithstanding the judgment, to relief upon the principles of equity against forfeiture. The remaining cases for the proposition that prior demand is unnecessary are Bacon *vs.* Park, 19 Utah, 246; Browne *vs.* Rogers, 8 Minn., 247, and Davis *vs.* Burrell, 10 C. B., 822. As against these, and supporting the proposition that prior demand is necessary, are: Conner *vs.* Bradley, 1 How., 217; Prout *vs.* Roby, 12 Wall., 477; Kansas City Elevator Co. *vs.* Union Pac. Ry. Co., 3 McCreary, 462, 472; McQuesten *vs.* Morgan, 38 N. H., 400; Jackson *vs.* Hermann, 17 Johns., 66, 70; Memi *vs.* Rathbone, 21 Ind., 454, 462; Bowman *vs.* Foote, 29 Conn., 331, 341; Allen *vs.* Dent, 72 Tenn., 676, 680, and Merifield *vs.* Cobleigh, 4 Cush., 178, 184-5.

In the case last cited, there was a grant of land with condition that, whenever the grantee "shall neglect or refuse to support a fence around it, then this deed to be void"—the terms "neglect" and "refuse" being used, also, in the forfeiture clause of the lease in the case at bar (Record, p. 15). The court, by Shaw, C. J., held that such a condition, "when relied on to work a forfeiture, is to be considered with great strictness," and that both the terms "neglect" and "refuse" imply some previous demand, notice, or request, without which the estate cannot be defeated.

It was argued below that prior demand was essential only to the right to distrain; but neither Bowman *vs.* Foote, McQuenten *vs.* Morgan, Conner *vs.* Bradley, Prout *vs.* Robey, nor Merifield *vs.* Cobleigh relate in any way to the subject of distraint.

A legal proposition that the omission to pay the taxes for which the sale was made constitutes a ground of forfeiture against which courts of equity cannot relieve may be discussed, first, as an abstract proposition, and, secondly, under the particular facts of this case.

1.

It is impracticable, within the time in which this brief must be prepared and printed, to discuss and to quote from the authorities, English and American, with the same fullness or in the same detail as has been done in the very exhaustive brief for the appellant in No. 203, nor, it is believed, can it be necessary or useful to the court to do so.

The extract from Platt on Leases in Appendix A to the Brief for Webb gives a very fair résumé of the English cases, and in a manner not unfavorable to the decree appealed from, even if the doctrine of the English authorities were conclusive of the question at issue or in harmony with the American authorities. The original rulings were to the effect that forfeitures for breaches of covenants to repair or the like might be relieved against when resulting from un-

avoidable accident, fraud, surprise, or ignorance not willful, and, according to Lord Erskine in Sanders *vs.* Pope, even though willful if the case were one in which fair compensation could be made (Brief for Webb, Appendix A, pp. 9-13). In Woodman *vs.* Colcroft, 10 Ves., 67, in which case the lessee had refused to repair after notice from the landlord to do so, the case was distinguished from Sanders *vs.* Pope on that ground, and relief denied. In Hill *vs.* Barclay, 18 Ves., 62, Lord Eldon dissents from the further view of Lord Erskine that relief against forfeiture for breach of a covenant to keep the premises in continuous repair might be granted if the tenant placed them in perfect repair before the end of the lease, upon grounds forcibly stated at pages 15-16 of the Appendix; and in Bracebridge *vs.* Buckly, 2 Price, 200, where the breach was of a covenant to expend £1,000 in repairs within twelve months from the beginning of the term, Lord Erskine's view was overruled by a majority of the judges, against a forcible dissent by Baron Wood, the majority opinion proceeding principally upon the view that there were no means of ascertaining the compensation which should be made, or the mode of making it if ascertainable (Appendix A, p. 17).

The result of these decisions, as summarized by Mr. Platt (Appendix A, p. 18), is that "relief against forfeitures incurred by breaches of covenants to repair generally, or to lay out a specific sum in repairs within a certain time, will not be granted unless the omission and the consequent forfeiture be the result of unavoidable accident, fraud, surprise or *ignorance not willful,*" etc.

The only instances of collateral covenants referred to in the opposing brief for breaches of which relief against forfeiture have been denied, or which counsel for the appellee have found, are covenants to repair and to insure, and, even as to these, the authorities are by no means agreed. With respect to repairs, the refusal is placed exclusively on the ground of the inability of a court of equity to superintend

repairs (White & Tudor's Leading Cases, vol. II, pt. 2, p. 2031); while the refusal of relief for breach of the covenant to insure is placed partly upon the ground—hardly appreciable under the conditions of today, when, in connection with mortgages and other contracts, the policies of insurance are issued or delivered to and held by the parties secured—that the landlord is without means of seeing to the observance of the covenant, but must rely upon the tenant for the fulfillment of the engagement (White & Tudor, *supra*, p. 2033), and partly upon the ground that the court is without means of arriving at compensation or damages to be allowed for the breach. On the other hand, the authorities are numerous that a court of equity may determine the compensation, retaining the bill and directing an issue *quantum damnificatus*, if necessary (White & Tudor, *supra*, p. 2024). No such question, however, can arise in a case like the present, since the amount necessary to pay the omitted taxes is a question of computation merely, wholly free from uncertainty or necessity for resort to speculation, or to the judgment of a jury. Upon its payment, which the decree directs and the appellee tenders herself ready to make, compensation will have been made, and the parties restored completely to the former *status quo*.

Covenants to pay taxes are in the nature of covenants to pay money. Giles *vs.* Austin, 62 N. Y., 491-3; McCartey *vs.* Gokey, 31 Iowa, 505. And an action of debt will lie upon such a covenant. Trinity Church *vs.* Higgins, 48 N. Y., 532.

"A covenant in a lease by tenants to pay taxes and assessments is in the nature of a covenant to pay money; and a forfeiture incurred by a breach, therefore, will be relieved against on the same principle." 1 McAdam on Landlord and Tenant, sec. 187.

"The omission in this case [*i. e.*, to make repairs promptly] is not of the same nature as a failure to repair when waste is going on, or to insure. It is a mere failure to pay money, and is much like an omission to pay taxes,

which, in the absence of bad faith, and none in the pleadings or evidence has been charged, and no new rights have intervened, has been held not to bar the lessee from relief." Lundin *vs.* Schoeffel, 167 Mass., 465.

And in Sanborn *vs.* Woodman, 5 Cush., 36, 41, breach of a covenant to pay interest on a mortgage was held relievable, the court declaring:

"There is clearly no distinction in principle or in the authorities between a forfeiture for the non-payment of rent, and the forfeiture in the present case for the non-payment of interest."

Returning to the English cases, as pointed out by White & Tudor at page 2032 in the volume named, where the cause has been surprise or ignorance not willful, even in cases of breaches of covenants to repair, to erect houses, or the like, the court will interfere on compensation being made; and, in one of the principal cases for the doctrine contended for, namely, Hill *vs.* Barclay, 18 Ves., 62, Lord Eldon expressly excepts cases of this character, although the covenant was for repairs. In Green *vs.* Badger, 4 Sim., 101, in which the covenant was to insure, the breach was "willful;" and in Reynolds *vs.* Pitt, 19 Ves., 143, the decision was put upon the ground that, if the lessee, who cannot reimburse his landlord in case of fire, "has willfully and obstinately prevented that insurance, and it has so subsisted for one, two or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant who has so neglected to perform his contract can insist that the landlord shall keep all the terms with him, as if he had fully performed it?"

In Harris *vs.* Rolfe, 2 Price, 210, note, as in the American case of Bacon *vs.* Park, 19 Utah, 246, cited in the opposing brief, the breach was intentional and willful, and throughout a period of years.

In Bacon *vs.* Park, apart from the fact that the complainant really had no interest in the leased premises, which was

sufficient in itself to defeat the right to relief, it was an undisputed fact that he had known for years of his default in payment of the taxes, that it had continued until the amount was nearly $4,000; that the property had been sold for their non-payment, and that the time to redeem had nearly expired; and that, under all these facts, he declared that he did not intend to redeem until the very last day, making it necessary for the landowner to declare the forfeiture in order, himself, to raise the necessary money to redeem the land, or else lose it if, on the last day, the complainant should fail to redeem. In the case at bar, as indicated in the opinion of the Court of Appeals, appellee's payment of the taxes for the succeeding years makes it evident, even if this were denied in the pleadings or the evidence, that the non-payment of the instalment for the second half of the year 1898 was neither willful nor intentional, but was an inadvertent omission, under distracting and distressing circumstances, and largely, if not principally, induced by the conduct of the lessor herself. The motives of the lessors, too, are essentially different in the two cases. In the Utah case the forfeiture was for the necessary purpose of raising the money to pay the taxes and save the title, while, in the present case, it was to be availed of only for the purpose of getting a higher rent, and not then unless or until it was perfectly certain that a new tenant at an increased rent had first been secured.

Baldwin *vs.* Rees, 6 Ohio Dec., 556, printed as Appendix B to the brief of the appellant, was a case in an Ohio superior court, in the year 1880, in which the covenant to pay taxes had been broken, the property sold by tax sale to A, who several years later sold it to the lessor, who had entered, resumed possession of the premises, and had remained in quiet possession thereof ever since, the lessee claiming no mistake, surprise or ignorance. The court, it must be conceded, properly denied relief against the forfeiture, though holding, in doing so, that equity does not relieve "against

a forfeiture effected for such a breach." Upon this point, however, the case is at variance with Eichenlaub *vs.* Neil, which, though reported in 3 Ohio Decisions, at page 365, is later than Baldwin *vs.* Rees, having been decided in 1895, and reviews and overrules that case in no uncertain terms.

The only other case in which relief against forfeiture for breach of a covenant to pay taxes which any of the counsel in this cause have been able to discover is that of Gordon *vs.* Richardson, 185 Mass., 492. The case seems principally relied upon in the opposing briefs on the ground of its reasoning, although that reasoning, it is submitted, is distinctly against the appellants. In it there had been a tax sale for the default, the validity of which was undisputed, and the claim to relief was based upon the fact that it might yet be redeemed. The court said that default in the payment of rent might be relieved against, because the very thing contracted for—*i. e.*, the payment of the rent—might yet be done, but the taxes, having been already paid by the sale, could not be again paid; or, if the real substance and nature of the covenant to pay taxes were looked at, they were to protect and hold harmless the landlord's estate, which could not be done where that estate had been sold and a paramount outstanding title had come into existence. Assuming, for present purposes, this reasoning to be correct, it is in no way in conflict with the opinion below, which holds that the tax has *not* been paid by sale, that the landlord's estate has *not* been sold, that *no* outstanding title, paramount or otherwise, has come into existence; that the matter stands as though the tax certificate and the tax deed had never been issued, and that the situation, therefore, is that there are taxes upon the property in arrears, due and unpaid, for which the lessee is liable, which were not paid through inadvertence or misadventure, and which she now offers to pay (Record, p. 450). The case is, therefore, under the reasoning in Gordon *vs.* Richardson, precisely in the same category as if the default were in the payment of rent—the tenant is still in a position to do

the very thing he contended for, namely, to pay the taxes, and this is precisely what the permits and decree require her to do.

The insurance cases relied upon in the opposing brief to the effect that, after death of the insured, his representatives or beneficiary will not be allowed to recover the amount of the lapsed policy by then making the comparatively small premium payment, so obviously fall short of the case at bar, both in principle and in its equities, that it is deemed unnecessary to discuss them. The principle upon which the decisions in these insurance cases rest is laid down by this court in Insurance Co. *vs.* Statham, 93 U. S., 24, 30, and Klein *vs.* Insurance Co., 104 U. S., 88, 91.

An extract from the opinion of this court in Sheetz *vs.* Selden, 7 Wall., 416, 422, is relied upon at page 33 of the Brief for Webb as committing this court to the doctrine of the English cases against relief in the case of covenants to repair, to insure, and not to assign. Examination of the entire paragraph from which the extract is taken, however, will show that the court is simply summarizing the doctrine of the English courts. The paragraph closes as follows: "Such is now the settled English rule upon the subject. In Bracebridge *vs.* Buckly, Baron Wood, in a dissenting opinion, made an earnest assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country," citing 2 Story's Eq. Jur., secs. 1315, 1316, and note.

Section 1316 of Story's Equity Jurisprudence, thus cited, is as follows:

"The true foundation of the relief in equity in all these cases, is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to. And, notwithstanding the objections which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for

a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury of the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."

To this may be added the following from Judge Redfield's note, also cited in the opinion in Sheetz *vs.* Selden:

"The only argument of Lord Eldon is, that courts of equity decree what they presume is a compensation, but it, in a given case, may be no just compensation. Now, in the first place, this is no objection to interference, in all cases where a complete and adequate compensation can be given; but only to interference where the facts establish that there cannot be such adequate and complete compensation. And this is the explanation which, theoretically at least, courts of equity adopt. In the next place, it is supposed by Lord Eldon, in Reynolds *vs.* Pitt, 19 Ves., 140, that interest for the delay in the payment of money is not, or will not be, an adequate compensation for the omission to pay at the time

appointed. That objection equally applies to the allowance of money at law as a compensation. It may, in a given case, be inadequate to the particular loss sustained by the creditor. Yet it is uniformly acted upon without hesitation; and the creditor will not be permitted to recover a greater compensation. * * * No system of laws can provide for all the remote consequences of the non-performance of any act. Human justice must stop, as it ought, at the direct and immediate and necessary consequences of acts and omission, and not aim beyond a reasonable indemnification for them."

Applying these principles to the present case, what indemnification will be lacking to the appellant Webb, or to those whom he represents, when the decree from which he appeals, affirmed by this court, is carried out? The tax deed will have been annulled, the taxes paid, the cloud removed, and the estate of the testatrix as to this property completely restored to the same condition, in all respects, as if no default had occurred, nor any tax sale made. It is true that, as suggested in his brief, he may have incurred liability for counsel fees in the cause; but, it is respectfully submitted, the conduct of himself and his lessor in attempting to exploit, for purely mercenary and selfish ends, the opportunity thought to have been offered by the misadventure of the appellee, the careful, self-provident circumspection which withheld decision to forfeit until it was seen "when I am to get another tenant" (Record, p. 95), the harsh charges of untrustworthy faithlessness and the like against the unfortunate appellee as the reasons for refusing to allow her to remain in occupancy of the premises, when, as subsequently admitted, there was no real hostility or distrust, but only a desire to get rid of the long term and seek a higher rent, and the entire subsequent course of action in regard to the matter, amply justified the supreme court of the District of Columbia in allowing the appellant only his taxable costs in the case, and the Court of Appeals in affirming that decree.

Returning to the consideration of the authorities upon the subject of the power of a court of equity to relieve against

forfeiture for breach of a covenant to pay taxes, it will be observed that Rees *vs.* Baldwin, overruled in the later cases of Eichenlaub *vs.* Neil, and Bacon *vs.* Park, both resting upon extreme conscious and willful default as before noted, are the only authorities to be found in the lengthy and exhaustive brief of the appellee. As against these, and in addition to Lundin *vs.* Schoeffel, 167 Mass., 465; Sanborne *vs.* Woodman, 5 Cush., 36, and Giles *vs.* Austin, 62 N. Y., 491-3, are the following authorities:

"Where there has been a breach of a covenant to perform some collateral duty, such as to repair or to insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred." McTier *vs.* Osborn, 146 Mass., 499, in which case the breach was of a covenant to keep the premises insured in favor of the lessors.

In Garner *vs.* Hannah, 6 Duer, 273-4, the court held it to be "perfectly clear that, although the landlord might forfeit and obtain judgment for possession for breach of the covenant, the tenant will be entitled, notwithstanding that judgment, to relief upon the principles of equity, against the forfeiture. It is the province of a court of equity to interfere to give relief against the forfeiture for the breach of other covenants, as well as for the payment of rent"—the breach being the same as in the present case, namely, that of a covenant to pay the taxes upon the demised premises.

"Courts of equity treat provisions for the forfeiture of leases for the non-payment of rent, as security, merely, for the payment of the rent, and, at an early date, assumed jurisdiction to relieve tenants from such forfeiture upon the payment of all rents in arrear and the costs of the proceeding, if any, instituted by the landlord for the recovery of the possession. And this rule has been extended to cases of forfeiture for non-payment of taxes" (18 Am. & Eng. Encl. L., 389).

In Hand *vs.* Swaritz, 148 Pa. St., 207, cited by the other side, the court puts a covenant to pay water rates upon precisely the same footing as a covenant to pay rent, and cites Fernwood Masonic Hall Association *vs.* Jones, 102 Pa. St., 307, to the effect that a covenant to pay gas bills stands in like manner upon the same footing.

In Tibbetts *vs.* Cate, 66 N. H., 550, which the opposing brief supposes to have gone "upon the ground that the lessee was ignorant of business and that her failure to pay the taxes as covenanted was not willful," the court says: "The condition of the will relating to the payment of taxes, for the nonperformance of which a forfeiture is claimed, was intended to secure the payment of money, and the damages for the default can be readily ascertained. The case is a proper one for equitable relief, unless the complainant has lost the right to claim it by her inequitable conduct"—and her ignorance of business was simply referred to as explaining her default in payment of the taxes, as showing that it was not willful or inequitable conduct.

See, also, for additional cases in which relief was granted against attempted forfeitures for forgetful or negligent omission to pay taxes (Noyes *vs.* Anderson, 124 N. Y., 175; McClartey *vs.* Gokey, 31 Iowa, 506), to make repairs within the time limited (Bargent *vs.* Thompson, 4 Giff., 473), to improve by the erection of a building (Hagan *vs.* Beck, 44 Vt., 286), to maintain a gas supply pipe (South Bend Oil Co. *vs.* Edgell, 86 Am. St. Rep., 43), omission to pay an incumbrance assumed (Hancock *vs.* Carleton, 6 Gray, 39; Kopper *vs.* Dyer, 59 Vt., 477; Steel *vs.* Branch, 40 Cal., 3, 11-12), covenants not to assign until improvements are completed (Grigg *vs.* Landis, 21 N. J. Eq., 494, 510-2).

That the weight of authority is, therefore, overwhelmingly in favor of the decree below is abundantly apparent; and that these authorities best comport in reason with the principles upon which the entire doctrine of the equity jurisdiction to relieve against forfeitures is founded, in cases in which the

status quo can be fully restored, it is submitted is equally obvious.

"The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the default is to secure some payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest. If it be to secure the performance of some collateral act [*e. g.*, the payment taxes], a compensation for non-performance can be made, and a court of equity will ascertain the amount of damages, and relieve upon their payment" (1 Pomeroy Eq. Jur., sec. 433).

"The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will, therefore, relieve the debtor party from such penalty or forfeiture whenever the actual damage sustained by the creditor can be adequately compensated" (*Id.*, sec. 381).

Of Peachy *vs.* Duke of Somerset, referred to in the opposing brief as a leading case, White and Tudor, vol. II, pt. 2, p. 2015, referring to the opinion of Lord MacChesford, says, at page 2023: "He, however, seems to confine the cases in which equity interferes to those where the penalty is designed to secure the payment of a sum of money. The principal case of Sloman *vs.* Walter [breach of a covenant to allow use of a room] shows that the jurisdiction of equity is not of so limited a nature, but is extended to cases where the penalty is inserted not merely to secure the payment of money, but the *performance of some collateral act.*"

The attempt, at page 36 of the brief, to distinguish Giles *vs.* Austin, 62 N. Y., 486, on the ground that in that case the tax deed had not become irredeemable and no rights of third

persons had attached, is untenable, the decree appealed from being, in like manner, based upon the finding of the court that the tax sale is utterly void, so that the tax title is not merely redeemable, but non-existent, and, consequently, never gave any rights to third persons. And, indeed, that there should be no forfeiture unless the tax sale is irredeemable seems to be conceded in the learned brief on behalf of Webb, at pages 166-7.

To sum up the authorities upon the question of the jurisdiction to relieve against forfeiture for breach of a covenant to pay taxes, those denying it are three in number only, namely, Bacon *vs.* Park, 19 Utah, 246; Baldwin *vs.* Rees, 6 Ohio Dec., 556, and Gordon *vs.* Richardson, 185 Mass., 492, the first two being cases of willful default, and it not appearing in the last of them whether the default was or was not the result of inadvertence, misadventure or willfulness. Of them, Baldwin *vs.* Rees is expressly overruled in Eichenlaub *vs.* Neil, 3 Ohio Dec., 365, while Gordon *vs.* Richardson is based upon the fact only that, the tax sale in that case being valid, and the tax already paid, it was impossible for the lessee to perform, so that the very thing the lessee contracted to do can no longer be done, as in the case of rent (see the quotations at pp. 60-1 of the Brief for Kanns), and as in the case at bar.

On the other hand, sustaining the jurisdiction, besides Eichenlaub *vs.* Neil, *supra,* and Gordon *vs.* Richardson, where the tax may still be paid, are Garner *vs.* Hannah, 6 Duer, 262; Giles *vs.* Austin, 62 N. Y., 493; McClartey *vs.* Gokey, 31 Iowa, 505; Noyes *vs.* Anderson, 124 N. Y., 175; Tibbetts *vs.* Cate, 66 N . H., 550; Ins. Co. *vs.* Biggs, 8 Baxt., 563; Muller *vs.* Earle, 3 Jones, &c., 461, 473; 69 L. R. A., 833, 844, 848. Analogous to these, and repudiating the doctrine that breach of collateral covenants to repair, insure, or the like, cannot be relieved against, are Mactier *vs.* Osborn, 146 Mass., 399, to insure; Lundin *vs.* Schoeffel, 167 Mass., 465, to repair; Hand *vs.* Swaritz, 148 Pa. St., 207, to pay

water rents; Fernwood Association *vs.* Jones, 102 Pa. St., 207, to pay gas bills; Sanborn *vs.* Woodman, 5 Cush., 541, to pay interest on a mortgage, etc., there being no American authorities, it is believed, opposed to these.

With regard to the word "accident," the meaning of which is made the subject of considerable discussion in the opposing brief, it is to be said that the word is used in various senses by different courts, and in different cases. Sometimes its meaning is restricted to pure "accident," without the intervention of any human agency, as in the case of damage by lightning, etc., in others, where human agency is included, provided it involve no act of the party himself; in other cases, that can be an accident which happens partly by one's own agency, if free from negligence on his part, and, in still others, some degree of inadvertence or carelessness upon his part is admitted.

Webster defines it as "An event which takes place without one's foresight, or expectation;" Worcester, as "An event proceeding from an unknown cause, or happening without design of the agent;" the Century Dictionary as "In general anything which happens or comes to be without design—a happening without intentional cause." Roget's Thesaurus associates it with "absence of intention," while in Crabbe's English Synonyms, "That is an *accident* which is done without intention, that is a *chance* which can not be brought about by use of means." In some of the authorities it is held, in the view of the equity courts, to be an event occurring without negligence on the part of the complainant, usually, however, meaning in this connection willful or continuous negligence. All these distinctions are, however, largely academic, even the authorities referred to not precluding relief because of inadvertence or non-willful negligence, but referring the relief in such cases to the equally available head of equity jurisdiction, Mistake.

The extract from section 146 of Story's Eq. Jurisprudence, contained at page 114, in regard to mistake will, of course,

be read in connection with its context. At section 110, when formally defining the term, that author states:

"It is sometimes the result of accident in its large sense, but, as distinguished from it, it is some unintentional act or omission or error, arising from ignorance, surprise, imposition or misplaced confidence."

And note 1 to the section adds:

"Mr. Jeremy defines mistake, in the sense of a court of equity, to be, 'that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done' (Jeremy's Eq. Juris., B. 3, pt. 2, p. 358). This distinction seems too narrow, and it does not comprehend cases of omission or neglect."

To the question, discussed at length in the opposing brief, whether compensation can be made to the landlord, it is conceived unnecessary in behalf of the appellee to devote much time or space. Equity deals with each case of this character upon its own circumstances and intrinsic merits, and, as said by Judge Redfield in the note to 2 Story's Eq. Jur., sec. 1516, in answer to the objection that there may be a given case in which what courts presume is compensation might not be just compensation in fact, "This is no objection to any interference, in all cases where a complete and adequate compensation can be given; but only to an interference, where the facts establish that there cannot be such complete and adequate compensation. And this is the very exception, which, theoretically at least, courts of equity adopt."

The brief of appellant Webb, notwithstanding the limitless industry and the ingenuity and skill which it exhibits, points out no particular in which performance of the decree below will leave appellant in a different situation from that in which he would have been had the default in the tax payment never occurred, with the single exception of his liability to counsel fees, incurred, not in the defense of his title, but in the effort, by appealing from court to court, as

in the first instance and in every other conceivable way, to deny the appellee her equitable right to redeem, upon terms of full compensation, and this, admittedly, without any real loss of confidence in the tenant or for any one of the reasons assigned in the correspondence set forth in the record, but in order to deny the appellee the benefit of the rental rate fixed by the lease, and to get the higher rental offered by the Kanns, whether from them or from the appellee. As stated above, neither of the lower courts considered the appellant Webb entitled to solicitor's costs or counsel fees as against the appellee, under such circumstances, and we submit that the facts of the case present no occasion for interference with the judgment and discretion of those courts upon such a question.

It only remains to consider, in this connection, four cases, one in this court, and three from England, which appear to be strongly relied upon on behalf of appellant Webb, namely: Grymes *vs.* Saunders, 93 U. S., 55; Duke of Beaufort *vs.* Neeld, 12 Cl. and F., 248; Barrows *vs.* Isaacs, 1 Q. B. D., 1891, 417, and Eastern Tel. Co. *vs.* Dent, 1 Q. B. D., 1899, 835.

The first and second of these cases relate neither to the subject of leases nor to that of forfeiture, but to what is designated in the text books and authorities as unilateral mistake in cases of contract. They hold simply with the authorities generally that in such cases the party who has in terms contracted with another to do a particular thing in plain and unambiguous language, upon the faith of which undertaking upon his part the other party has entered into obligations and acquired rights in good faith and without notice, may not rescind his contract to the loss and injury of such other party on the ground that he, himself, through his own fault, was mistaken in respect to some features of the agreement. The rule rests upon considerations of public policy and necessity, the right to relief upon such grounds, if recognized, being destructive of the possibility of business

transactions between men. In this class of cases, the fact of mistake may be undisputed, but, unless under the exceptional circumstances instanced in Grymes *vs.* Saunders, the rule that he whose negligence occasioned the inconvenience or loss must bear it prevails. Such cases, resting upon such considerations, are manifestly without relevance to cases of forfeiture, where the mistake, accident, surprise and the like are confessedly, generally, if not always, upon the party seeking the relief, and where the very principle of the jurisdiction is that the enforcement of the forfeiture is inequitable and an oppression upon the complainant, which may be relieved against without injustice, hardship or loss to the adverse party.

The other cases, Barrows *vs.* Isaacs and Eastern Tel. Co. *vs.* Dent, though arising under leases and relating to forfeitures, belong in their facts to the same class of cases as those just mentioned, and turn upon the same principles. They were cases of extreme hardship, nor were the courts which decided them insensible of that circumstance; but, read in connection with their facts, it is difficult, and perhaps impossible, to dissent from the reasoning and the decision of the courts as applied to them.

In the first of them, Barrows *vs.* Isaacs, a tenant, bound not to sub-let without the consent of his lessor, did sub-let to responsible sub-tenants, through forgetfulness of his solicitor as to the terms of the lease, or through negligence in not consulting it. The breach did not result in a mere debt or condition, which could be discharged or removed by the payment of a definite, liquidated or ascertainable sum of money, as in the case of non-payment of rent, taxes and the like, nor could the *status quo* be in any manner restored. The sub-lessees were in possession, and, if the forfeiture were waived or relieved against, must have remained so. The contention was that they were parties unobjectionable in every respect, to whom the lessor could not have had any valid objection if the mistake had not occurred and if he had

been applied to in time, the lease providing that he should not arbitrarily withhold consent in the case of respectable or responsible applicants; but the court based its decision upon the fact that the lessor might withhold without arbitrariness, even in the case of respectable and responsible persons, since even such persons might desire to carry on a trade which would be injurious to him, or tend to depreciate his property, or he might object to any underlease of a part, only, of the property, as was the character of the sub-lease in question, and that many other reasons for objecting might be suggested.

That forgetfulness of the terms of the lease, or failure to consult it before underletting, may well be held not to be accident, mistake or surprise sufficient for relief under such circumstances, leaving the premises to remain sub-let without the consent of the lessor, may be conceded, great as the hardship may have been.

The mistake or negligence in this case, it will further be noted, was, not that of the lessee himself, but of his agent, which fact, where the breach was that of a covenant to pay taxes, is held in Noyes *vs.* Anderson, 124 N. Y., 175, to be a ground for relief, as showing that the breach was not willful; though necessarily incapable of altering the rule under the facts of the Barrows case, now under consideration, since to have held otherwise would have been to impose upon the lessor the consequences of the negligence of the lessee's agent.

Eastern Tel. Co. *vs.* Dent, 1 Q. B. D., 99, was, also, the case of an underlease by a lessee without the lessor's consent, the lease containing a provision for forfeiture in such event, though stipulating that the lessor should not withhold consent unreasonably. The lessor had previously consented to the sub-letting of a part of the demised premises to the sub-lessees, from which it was argued that the omission to ask consent was reasonably to be regarded as unimportant, and that the plaintiff lessor could not reasonably have with-

held his consent; but the court, by Smith, L. J., holding the case governed by Barrows *vs.* Isaacs, declares: "I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect," to which Romer, L. J., adds: "It cannot be said that the lessors unreasonably withheld consent to a sub-letting, because no consent was asked for." The case is apparently considered by the court to be in conflict with Hyde *vs.* Warren, 3 Exch. Rep., 72, 81-2, though, in that case, the lessor was bound to accept any respectable and responsible person, and therefore would seem to be clearly distinguished from Barrows *vs.* Isaacs, where the agreement was not to refuse arbitrarily, and from Eastern Tel. Co. *vs.* Dent, in which the stipulation was not to withhold consent unreasonably.

Taking these cases and their reasoning together, it is submitted, in the first place, that they do not deny the jurisdiction of the court in cases like the present, and, in the second, that they cannot be so construed without rendering them hopelessly antagonistic to the overwhelming weight of authority upon the subject of relief against forfeitures, both English and American.

In the first place, both the cases in question presented applications to the court, not to grant relief against forfeiture for breaches the consequences of which could be fully and entirely removed and the parties completely restored to their former status, but, to use the language of the court in the latter one, to run a pen through the covenant broken and render it of no effect—*i. e.*, to deprive one of the parties wholly of its benefit because of the forgetfulness or mistake of the other. The cases, therefore, are identical in principle with suits, not for relief against forfeiture at all, but on the ground of unilateral mistake, of which Duke of Beaufort *vs.* Neeld and Grymes *vs.* Saunders, *supra*, are types; the only difference being that, in the last-mentioned cases, the mistake occurred in the original entering

into or making of the contracts, while in Barrows *vs* Isaacs and Eastern Tel. Co. *vs.* Dent they occurred in the performance of them. The relief, if granted, would have been the same, in effect, in each of the cases, namely, to deprive one of the parties of the contract he had made, and upon which, unaltered, he had the right to stand, because of the negligence or mistake of the other party to that contract; and not, as in cases like the present, to restore both parties to precisely the same position which they had severally agreed to occupy, and which they would have continued to occupy under the very terms of their contract but for a wholly innocent, unintended inadvertence or oversight in respect of them.

The principle underlying Grymes *vs.* Saunders and the other cases of that class, is thus stated in that case, 93 U. S., at page 62: "A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo. If this cannot be done,* it will give such relief only where the clearest and strongest equity imperatively demands it."

But in the second place, if Barrows *vs.* Isaacs and Eastern Tel. Co. *vs.* Dent are to be construed as holding that equity cannot, or will not, relieve against forfeitures which would not have occurred but for some forgetfulness, oversight or negligence upon the part of the party in default, then they are irreconcilably in conflict with the entire history and existence of this branch of equity jurisprudence. If correct, then not only did the court err in relieving against forfeiture for forgetful or negligent omission to keep the interest on a mortgage paid up (Sanborn *vs.* Woodman, 5 Cush., 316), or to pay taxes (Giles *vs.* Austin, 6 J. & S., 325, 62 N. Y., 235; Garner *vs.* Hannah, 6 Duer, 273-4; Eichenlaub *vs.* Neil, 3 Ohio Dec., 365; Noyes *vs.* Anderson, 124 N. Y., 175), to make repairs within the time limited (Bargent *vs.* Thompson, 4 Giff., 473), to improve by the erection of a building (Hagar *vs.* Beck, 44 Vt., 286), to maintain a gas-supply pipe (South Bend Oil Co. *vs.* Edgell, 86 Am. St.

Rep., 43), and the many other cases of relief against forfeiture for breach of collateral covenants, but the whole doctrine of such relief, even for breach through non-payment of rent, must also be overturned, wherever such default is not occasioned by *vis major* or other equivalent cause, unconnected with forgetfulness, negligence or other human fallibility or infirmity upon the part of the tenant—these cases falling no more under the definitions of accident or mistake than the non-payment of taxes, or the non-performance of any other stipulated duty, under similar circumstances.

2.

But, in the second place, and perhaps principally in the present case, even if the rule as to the power of courts of equity to relieve against forfeiture for breach of a covenant to pay taxes were, ordinarily, as is contended by the appellant, would that rule be applicable to a case like the present?

Suppose that, in the case of such a covenant, the lessor should take the payment of the taxes into his own hands, paying them himself, or through his own agents, and simply calling upon the lessee from time to time to reimburse their amount, and that, after such a course of dealing by him with regard to the matter, extending through a number of years, he should, through inadvertence or otherwise, omit to pay an instalment, could it be contended that, the rental value of the property having increased in the meantime, he could take advantage of the default, terminate the lease, and either require that the lessee should take a new term, at a higher rate, or else lease to a new tenant, for the sake of the increased rental? These are, it is submitted, precisely the conditions presented by the present case, unless the appellant's contentions in respect to either the legal necessity, or the actual fact, of a changed condition in respect to paying the taxes after the death of the original lessor and the subsequent assignment to the appellee, can be sustained under the facts and circumstances established by the record. Indeed,

at p. 68 of the appellant's brief, it seems to be conceded that the lessor would be estopped under such circumstances, unless the estoppel is obviated by showing that the appellee bought without knowledge of this course of conduct on the part of the lessor, or received notice that the lessor intended to charge it.

The lease having been made to take effect October 1, 1890 (Record, p. 13), we find the lessor's letter of May 26, 1891, calling upon the lessee to send the tax money falling due at that date to her, so that she might, herself, make payment of it; and, though her similar leters are not inserted chronologically in the record, they and the checks of the lessee to Mrs. Kennedy's order are brought down to May 29, 1897, the date of the tax instalment immediately preceding the death of the lessee and the assignment of the lease to Mrs. King (Record, p. 279). It, therefore, only remains to consider what foundation there is for the claims on behalf of the appellant Webb that the conditions changed with the assignment, which claims appear to be three, namely:

1. That the assignment constituted a new starting point, under which it was incumbent upon the lessee to ascertain exactly what her obligations were, and, inferentially, to establish a new course of dealing with respect to the taxes (Brief for Webb, p. 106).

2. That the lessee must be shown to have bought with notice of the lessor's manner of dealing with the tax payments, in order to claim consideration in consequence of it (Brief for Webb, p. 68).

3. That the requirement of the lease that the taxes should be paid by the lessee could be, and was, revived against her by notice (Brief for Webb, p. 73).

1–2. The first and second of these propositions would appear to be purely hypothetical, with nothing in the record upon which to rest them. The lease and the lessor remained

unchanged, while Harry King, who had for years been manager of the business conducted upon the premises by the deceased lessee, continued in that capacity for the assignee. Upon what theory, under such circumstances, and especially where the inquiry arises merely in aid of an attempted forfeiture, can a court of equity be asked to impose upon the asignee the duty or inquiring of the lessor whether her uniform course of conduct for the past six or more years, under the same identical lease, would be changed?

3. The claim that, having estopped herself to hold the assignee to the duty of seeing to the payment of the taxes in the first instance, by her course of conduct, the duty of the tenant to do so was revived by notice, presents, of course, a question of fact, to be determined by the evidence; and the burden of proof in respect to it, necessarily, is upon the lessor. In addition, it is one upon which this court will not interfere with the findings of the courts below, unless there is error clearly shown (Shappirio *vs.* Goldberg, 192 U. S., 232, 240, and cases cited *supra.*

The only testimony upon the subject is that of Joseph King, who testified on direct examination, at p. 154 of the record, that, shortly before Christmas, 1897, Mrs. Kennedy told him she had neglected to notify the Kings in reference to the taxes; that she asked whether they would not have them paid, and that he had replied, saying he would go up and tell his brother; that he would notify him at once; that she needn't worry, it would be attended to; after which follow the two questions and answers quoted at p. 74 of the brief of the appellant Webb, and referred to at p. 58 of the Brief for the Kanns:

"Q. Did you notify your brother? A. Yes, sir. I went that night and told my brother, Mr. Harry King.

"Q. That was the only occasion that you recall that she discussed taxes with you? A. Yes, sir."

If this were the only testimony upon the subject, we submit that it would be stretching it very far beyond its reason-

able tendency and scope to hold, upon the strength of it, as is claimed more than once in the opposing briefs, that Harry King was "pointedly" given notice that he was expected by Mrs. Kennedy to pay all the taxes accruing subsequently to the date of this conversation, and that the lessor would thenceforward discontinue her uniform practice in that regard with respect to all further instalments of the taxes. New York Indians *vs.* U. S., 170 U. S., pp. 25-6. And see as to inconclusive testimony, even in an ordinary suit on contract, Oullahan *vs.* Baldwin, 100 Cal., 635.

The testimony of this same witness, Joseph King, on cross-examination, on the succeeding page of the record, however (p. 155), completely removes all ambiguity or possibility of misconception or discussion:

"Q. What taxes did she speak of? A. She spoke of taxes of 1897, sir.

"Q. Due in November, 1897, the preceding November. A. Yes, sir.

"Q. What did she say about them? A. She said she had neglected in notifying us.

"Q. Neglected to notify you about what? A. About the taxes.

"Q. That they were due or unpaid or what? A. That they were due.

"Q. She had neglected to notify you that those taxes for November, 1897, were due? A. Yes, sir.

"Q. What next did she say? A. And would we please see that they were paid.

"Q. What? A. See that they were paid.

"Q. I do not understand you. Do you mean she asked you if you would see if they were paid? A. She said 'Would you please see that they were paid,' and I said that I would attend to it.

"Q. Is that all? A. That is all, sir."

At pages 74-6 of the brief is set forth an extract from the cross-examination of Harry King (pp. 187-8 of the Record), the substance of which, upon this point, was that, although he knew the taxes were payable twice a year, he did not do

anything in the May following this conversation between Mrs. Kennedy and his brother, because he "had not charged his mind with it at all," and that the following November he did not do anything about the taxes, "for the same reason I stated before." One reading the quoted extract, only, would necessarily understand the witness as saying that he did not pay the taxes on either occasion, because he had not charged his mind with it at all. The reason "stated before," however, to which his testimony, taken as a whole, would readily show him to refer, was given on his direct examination, on page 170 of the Record:

"Q. What explanation is there for the fact that you paid no taxes between September, 1897 and July 1900? A. Mrs. Kennedy always paid the taxes. * * * Mrs. Kennedy had always paid the taxes herself. She would always notify us when the taxes were due, and what amount to send her, and we relied upon her. I did not charge my mind with the matter. My father's sad death in the fall of that year left both my mother and myself very much mentally distressed, and the condition in which the large estate which we supposed our father had was left caused us a lot of anxiety and worry. The creditors were clamoring at all times for their money, and we were beset on all sides by people who wanted their money that was due them. Endorsements for large amounts were cropping out, and the local banks here were after me every day. My mind was thoroughly unsettled. With the management of the business and because of finding the business in such a condition, I had my hands full and all I could possible attend to.

"Q. What was the condition of your mother's mind and health during this period? A. My mother's health was very bad, and continued bad. From a woman weighing 190 pounds, she had gone down to about 145 or 150."

And then, after a letter from the lessor to the appellee in January, 1898, immediately following her interview with Joseph King about payment of the November taxes, the witness explains how, in the year 1900, when engaged with his co-receiver in paying arrears of taxes which had accumu-

lated on his father's large real estate holdings, it occurred to him to request his book-keeper to inquire about the taxes on the property in dispute, and the payment by him of all taxes which were then reported to be in arrears (Record, p. 170 *et seq*).

The foregoing is the entire testimony upon the subject of the alleged notice, "pointedly" or otherwise, given to the appellee, or to her son for her, that Mrs. Kennedy intended to discontinue the method of dealing with the taxes which had theretofore prevailed between them. We submit that it fails to present fair color, even, of either such an intention or of such notice; and, if not, then clearly the omitted payment is primarily due to the inadvertence, forgetfulness or oversight of the lessor herself, and, as the Brief for Webb appears to concede, should justly estop her from setting up a forfeiture by reason of that oversight. If this be correct, as we submit it is, it follows that the entire discussion of the legal question to which so much space has been devoted, in both briefs, is superfluous in so far as this case is concerned.

VI.

The remaining assignment of error is that the court erred in refusing to deny relief on the ground that the appellee has charged, and has failed to prove, actual fraud.

This question is presented in the brief, and, in view of the state of the record, is somewhat mystifying. The only allegations of the bill which can be referred to as tending, even, to present a charge of fraud, actual or otherwise, are those which aver that, as complainant is advised and believes, neither Mrs. Kennedy or the Kanns contemplated use of the tax certificate to endanger the title of the former, but that there existed an agreement or understanding, either express or tacit, that the tax title should be used in furtherance of a common design to dispossess the appellee, and to admit the Kanns as tenants, at an increased rental. That this was certainly true as to appellant Webb, down to October 9th, is

abundantly manifest throughout the record. When asked by Mr. Tobriner whether possession had been demanded or ejectment instituted under the tax title, he laughed at the idea and declared, "There is no danger of that." Down to October 9th he claimed to be at full liberty to continue the Kings in occupancy, if Mrs. Kennedy's interests rendered it desirable to do so (Record, pp. 317, 370). He testifies that, when Mr. Cohen had disclosed his purpose to purchase the tax title, he, Webb, did not consider that it would be any more dangerous in his hands than in those of Wiltsie; that he understood from Mr. Cohen (Record, p. 330) that he was going to buy the tax title "on speculation," and possibly expecting the Kings to take it up.

That the allegations of the bill in the paragraph now under consideration differ widely, if at all, from the facts, seems hardly capable of being seriously urged. Curiously enough, this charge of actual fraud now urged as a last means of defeating the bill, the success of which would seem to be to the interests which the appellant represents, rests mainly, not upon the bill, nor upon anything which the appellee has made a part of the record, but upon a letter written by her counsel to the appellant in an effort to bring about an adjustment without litigation, which letter, quoted at pages 151-2 of the Brief, is in the record only because the appellant, himself, has placed it there as an exhibit to his answer (Record, pp. 89-91).

Still more curiously, apart from the circumstance that no one of the four propositions of fact set out in that letter are seriously contested in the case in material particulars, at least in so far as the action of Mr. Webb or of Mrs. Kennedy is concerned, the Brief on his behalf, although arguing that these allegations, and the inference which it is claimed should be drawn from them, constitute charges against Mr. Webb of so gross a character that they should, of themselves, be a ground for denying the relief which otherwise the complainant might be entitled to, proceeds to demonstrate that

those allegations, even as it is contended they should be construed, not only do not charge him with anything that is wrong, but present the very course of conduct which he would have been advised to pursue, had he consulted his counsel (Brief for Webb, pp. 169-71).

To argue after such a concession that the averments, not only of the bill, but of the letter which he himself has placed in the record, and even when most adversely construed, charge only what it was entirely right and proper for the appellant to do, and what his counsel would have advised him to do, cannot constitute charges of fraud for which the bill should be dismissed, would seem to be a waste of time.

While the foregoing, it is believed, covers the questions of law and of fact raised upon the record and presented by the assignments of error, quite a number of attacks and charges are presented in the opposing Brief for Webb to which, perhaps, some brief reply should be made.

I.

FRAUD UPON THE LESSOR.

At pages 91-5 it is urged that the present life of the lease depends upon the extension of 1896, and that this extension was an "unfair bargain with an old woman," made by an "experienced business man," namely, the appellee's husband.

It will be recalled that, in the answer of the appellant, it was charged that Mrs. Kennedy paid taxes upon the entire demised premises, in forgetfulness of the duty of the lessee under the terms of the lease and under the erroneous impression that she was obliged to pay them and that this was due, in part, to the circumstance that she had no copy of the lease, and in part to her advanced age. On the *interlocutory* appeal to the Court of Appeals from the order of the lower court, granting an injunction *pendente lite*, the Brief on behalf of the appellant Webb commented as follows:

"Can it be doubted that the lessee, Harry King, Jr., well knew these facts and took advantage of them?" When the case was before the Court of Appeals on final hearing, the testimony then demonstrating that the charge in this regard was wholly without foundation, the appellant's brief made honorable amends as follows: "Of the original lessee, H. King, Jr., the defendant Webb can only speak favorably. It is a matter of regret to him and to his counsel that, under the misinformation that King had not paid the taxes under his covenant, such assumed action upon his part was unfavorably commented upon." Upon the present appeal, in this court, the deceased lessee is represented as an experienced business man who made an unfair bargain with an old woman, by obtaining from her the extension of October 8, 1896.

It must be noted, in the first place, that this charge is wholly foreign to any issue raised by the pleadings, or even in the evidence. The point is one first raised in an appellate court.

Independently of this point, it remains to be seen upon what foundations the charge rests. These are two, namely, the alleged extreme age of Mrs. Kennedy at the time of the extension in question, and the alleged inadequacy of the rental at that time. The first of these propositions is arrived at by "assuming" Mrs. Kennedy's age to have been 80 years at the time of her death, which would have made her 69 years old at the time of the original lease, and about 75 years old on the date of the extension in question. If, on the other hand, her age is assumed to have been 70 years at the time of her death, which assumption is quite as allowable as the first, then she was 59 years of age at the date of the original lease, and about 65 years old at the time of the extension. Surely, if the appellant had any such point as this in mind while the case was in progress, and it was allowable to rely upon it without an amendment of the pleadings, the age of Mrs. Kennedy should have been proven. If an afterthought, it is not to be determined in this court by assumption.

The claim that the rental was inadequate, or the bargain an unfair one at the time it was made, is supported by an equally ingenious but inadmissible assumption, namely, that at its date, in 1896, the property was worth the rental which the Kanns offered for it in 1901. Up to June, 1901, when Louis Kann "casually" offered the appellant $300 per month for the premises, they had made no offer for it, and in so far as the record discloses had not desired to rent it. There is no evidence that today the fair market rental value of the property is in excess of the $200 per month provided by the lease, apart from its special value to the Kanns for the purpose of ousting a rival merchant and of making their business premises continuous. Not a scintilla of evidence, or attempt at it, is made in the record to show that the extension, when made, was not perfectly fair to both parties, or in any respect disadvantageous to the lessee, nor that if, through business reverses or otherwise, the Kanns should no longer be in competition for the premises, a better rental could be obtained for them than that provided in the lease. The imputation of obtaining an unfair bargain from an old woman, against a man now deceased and against whom a year ago the appellant could "only speak favorably," would seem not to be justified by the record.

That reference to the briefs at former hearings of the case is allowable, even as a basis for imputing grave charges upon wholly unproved and erroneous assumptions, appears from pages 108-9 of the Brief for Webb.

So far from the property being worth $83,000, as per the ingenious computation at pages 93-4 of the Brief, Mr. Webb in his answer, replying under oath to the allegation of the bill that the property was worth not less than fifty thousand ($50,000) dollars, avers (Record, p. 84), "This defendant is unable to state whether the amount of said estate will largely exceed in value the amount of said legacies," which legacies were about $40,000, and upon which sum the rent reserved by the lease would be 6 per centum per annum, exclusive of taxes.

The appellant Webb secured the probate of, and is here claiming under, a will of the lessor nearly contemporaneous with the last extension of the lease, and a codicil nearly or quite two years later. He advised and conferred with her, according to his own testimony, as to whether she should insist upon or waive the forfeiture, and left the decision of that question to her own judgment; acted under her instructions, written in his absence, and otherwise dealt with her, down to the time of her death, in 1901, as a competent and capable person for business purposes (Record, pp. 78, 79, 81, 83, 27, 308, 320-1, etc.). He made the charge in his answer that appellee's husband had paid no taxes, but had left them to be paid by the lessee in forgetfulness by her of his obligation and through the fact that she had no copy of the lease, because he considered her recollection to that effect, in 1901, more reliable than that of the clerk of the real estate agent's through whom they were paid, and who acquainted him with the true facts of the case before the charge was made. These facts would seem to be a sufficient answer, if any were needed, to the present charge that she was incompetent properly to protect her interests in 1896, and was then made the victim of an unfair bargain by an experienced business man, upon no other ground than the fact that, five years later, the Kanns were willing to pay a higher rent to get the Kings out of competition with them, in a building separating their then stores. That they did not want the premises in 1896 would appear from the fact that they made no offer for them in 1897, when the death of Henry King, Jr., and the financial condition of his affairs made the lease a legitimate subject of offers to purchase.

Finally upon this point, the appellee having invested her insurance money and borrowed funds for the purchase of this lease in 1897, upon the faith of the lessor's written consent to its assignment to her, it is difficult to see how she could be affected by equities between the lessor and the original lessee, even if any existed, in respect to the fairness of the extension made in 1896.

II.

GOOD FAITH OF APPELLEE'S OFFER OF INDEMNITY.

The appellee having offered on October 8, and again on October 12, 1901 (Record, pp. 21-2), to annul the tax deed by legal proceedings at her own cost, and to indemnify Mrs. Kennedy by proper bond against any liability or loss in the premises, both of which propositions were declined in the manner shown at pages 21-3 of the record, the opposing brief argues that these offers were not made in good faith, because the appellee declined the proposition of October 30, submitted by Mr. Webb (Record, pp. 87-9), this proposition involving, among other things, a bond to pay $70,000 for the property in case of defeat, although, as shown above, Mr. Webb's answer swears that he cannot state that its actual value was in excess of $40,000. That the appellee's propositions were made in good fath is evidenced by the fact that she promptly gave in this cause, as required, bond with approved surety to indemnify the parties in interest against any liability to loss on account of the tax sale, in the amount fixed by the court pursuant to said allegation of the answer. The Webb proposition of compromise, however, would seem effectively to negative the argumentative suggestion of his brief in this court (p. 180), that, in proposing again to accept the faithless appellee as tenant, he did not indicate any willingness to remit to her diligence the payment of taxes on the property.

III.

ALLEGATION THAT APPELLEE IS NOMINAL PARTY ONLY.

In both the opposing briefs it is claimed that Harry King, not the appellee, is the real party in interest, the Brief for the Kanns below further declaring that the appellee's sons are

masquerading before the court "in the guise of a bereaved widow."

That the appellee purchased, paid for and conducted the business, partly with insurance money and partly with money borrowed from relatives for the purpose is shown by the record, and is nowhere contradicted. The allegations in question have no other support than the fact that Harry King, who had managed the business during his father's lifetime, continued to manage it for his mother, and that, in the spring of 1898, some eight or nine months after the purchase, the appellee gave two of her sons an interest in the profits of the business as compensation for their services in conducting it, no interest in the lease being assigned to or acquired by them.

IV.

ATTACKS ON HENRY KING.

Although there is not only no issue in the case which depends upon the testimony of Harry King, but no fact testified to by him which is at all in controversy, his integrity and good faith are attacked in sundry paragraphs, the purpose or reason for which attacks is not obvious.

The charge against him of fraud in selling the business of his deceased father to his mother, in his capacity of administrator, rests upon no other foundation than that a bill charging fraud was brought by certain creditors, answered by a full and complete denial in every particular, followed by an entire failure to produce any evidence by the cerditors to establish their charges, and, finally, by a hearing upon bill and answer, resulting in a decree for sale of the conceded assets of the father, which did not include the lease in controversy.

The attempt to fasten upon him the responsibility for an inaccuracy in his petition as administrator for sale of the lease was persisted in below, and is repeated here, notwith-

standing the fact that the testimony of the attorney who prepared the petition, at page 251 of the Record, is that it was drawn by him with the lease before him, and that, "If there was any mistake in setting out the term of that lease, it was my mistake;" and although the attorney further testifies, at page 252 of the record, that the mistake was an error of his own in calculating the time. The remaining charges in respect to averments of his answer in the creditors' suit are no better supported when the entire testimony, instead of isolated extracts from it, is taken.

It is further charged that, so far from the default in the case in controversy being the result of inadvertence or unintentional ignorance, Harry King was a persistent defaulter in the payment of taxes (Brief for Webb, p. 141 *et seq.*), and that this is shown by his letter to Wiltsie of September 21, 1901, in which he states, "unfortunately, we have paid you quite a considerable amount of money in the past for tax sales." That this charge, also, is utterly without justification in the facts is entirely apparent upon any fair consideration of the testimony as a whole. While managing his father's mercantile business for some years before his death, it already appears from the testimony, quoted *supra*, that the condition of the father's estate at his decease, which comprised a large amount of real estate, was a surprise. At page 193 of the record, he states that he had occasionally made tax payments for his father during the lifetime of the latter, but that he, Harry King, had never to his knowledge had any transactions with Wiltsie during the lifetime of Harry King, Jr., nor did he think that the latter had had any. After his father's death, he and Job Barnard, Esq., now a justice of the supreme court of the District of Columbia, were appointed receivers of the father's estate, and in that capacity made the tax redemption payments with which he is charged, paying thirty arrearage tax bills between February and July of the year 1900. It does not appear, and it is believed not to be a fact, that any of these defaults in tax payments occurred

while the receivers were in charge of the property, or through acts of omission or commission on their part.

In connection with the attack on the witness Rogers at pp. 108-9 of the brief, it is suggested that *if* Harry King had been present in court during the hearing of the interlocutory appeal, or *if* he had read the Brief for Webb at that hearing, he might have learned of the existence of an authority in New York to the effect that application to the tax officers for the tax bills, and a statement by them that there were none due, would be proof of the absence of willful neglect; that an attempt to prove a matter of this kind by a "suspicious witness" must recoil upon him, and (p. 111) that the failure of the bill to mention these "pregnant facts" is "most significant." That the manager of a millinery and cloak store may fail to appreciate the legal value of even a more pregnant fact, and to communicate it to his counsel in time to admit of its being stated in the pleadings, is shown by the circumstance that perhaps the most legally important fact in this entire case, upon the question of the right to forfeit, namely, the fact that, notwithstanding the covenant in the lease that the taxes should be paid by the lessee, the lessor from the very beginning of the term took that matter out of his hands and assumed the task of looking after their payment herself is, also, not mentioned in the bill. If this circumstance were not incontestably proven by letters and by the endorsements of checks in the lessor's own handwriting this omission might equally have been characterized as "most significant."

That the attack upon the witness Rogers is without foundation is shown by the references to the testimony *supra* at pp. ——— of this brief (MSS., pp. 12-13). So far from the testimony of Miss Addison being that she necessarily gave him the tax bill, her testimony (Record, pp. 454-5) shows that her statement to this effect was based on the assumption that the bill had been delivered in May, instead of in July as the fact was, and that at other times than May (p. 454) it happened quite frequently that one clerk

would receive the request for the bill from a person who was to pay it and have the bill made out by another clerk, and that this may have been the case with the bill of which the witness Rogers testifies.

V.

The bill (Record, p. 6) contains an averment that the defendant Cohen, when on his journey to Rochester for the purpose of buying the tax title, was unable to sleep on account of his doubts as to the propriety of the course he was about to pursue. Under the agreement between counsel in the case, other than the counsel for Webb, complainant's testimony upon this point was not offered, and it was not proposed to refer in the brief or in argument to this averment. The reference to it at page 153 of the Brief for Webb perhaps renders it necessary to show that the averment was, at least, not without foundation. In his answer (Record, pages 46-7), Mr. Cohen concedes that, more than a month after the transaction, he admitted that the "propriety" of the action he was taking rendered him unable to sleep on the journey from Washington to Rochester to purchase the tax certificate, which fact, however, he explains in his testimony, was intended to apply to the business rather than to the moral expediency of the step about to be taken, and this notwithstanding the fact that he was about to invest only $500.00 in the purchase, that he knew the tax certificate was good in the hands of anyone who would become the holder of it and that "the very least that could happen would be that Harry King would have to pay back his expenses and outlays, and something for his trouble" (Record, p. 327).

VI.

THE REAR PARCELS.

At pages 83 and 186 of the brief of appellant Webb it is charged as a further ground why relief should not be granted that Harry King, or the appellee, did not discharge the duty of paying the taxes on what is referred to as the rear parcels or portions of the demised premises, comprising (Record, p. 124) about 133 square feet of back ground.

With respect to these, it will be seen by reference to the lease (Record, p. 13) that the demised premises are described in it simply as No. 715 Market Space, without any designation of the lot or parts of lots on which these premises are located. By comparing the testimony of the witness Warner (Record, pp. 120-3) with the communications from Mrs. Kennedy to Henry King, Jr. (p. 166 *et seq.*), it will further appear that, from the beginning of the term to the death of the original lessee, Mrs. Kennedy, herself paying the taxes on all of the parcels, notified him of the tax on sublot A only, affording neither him nor his family any grounds to suppose that No. 715 Market Space comprised any ground other than sublot A, or that the lessee was liable for taxes on any ground other than the said sublot. Such laches as there was was the laches of the lessor; and certainly it does not lie with her or her representative to claim the right to visit with the penalty of forfeiture an error for which her action and conduct were primarily and solely responsible.

If, following the example of the opposing brief, references to the brief below are permissible, the following extract from page 25 of the Brief for Webb at the final hearing in the Court of Appeals, it is submitted, presents the proper view as to the rear parcels:

"It is true that the original lessee did not pay taxes upon certain small portions of the rear demised premises which

in some way had become severed, so far as the tax bills were concerned, from sublot A which comprised almost the whole of these premises. Under all the circumstances of the case, however, counsel are unwilling to claim that this was such a breach of covenant on the part of the original lessee as would have justified a forfeiture of the lease as against him."

And the assignee of the lease, certainly, was under no higher or more rigorous duty in respect to the rear parcels than was the original lessee.

VII.

HARDSHIP AND DANGER OF COMPULSORY RETENTION OF A FAITHLESS SERVANT.

Notwithstanding the disclosure in the testimony of Mr. Webb that the harsh expressions and epithets applied to the appellee in the correspondence accompanying the effort to terminate her lease and evict her from the premises were "legal," only, and did not really proceed from any hostility, unfriendly feeling, want of confidence or unwillingness to make terms with her as readily as with the Kanns if she would take a shorter term and pay as much (Record, pp. 309, 316-17, 351, 354-5), the attempt is made in his brief, at pages 36, 56, to recur to those unreal or "legal" objections as though they could be really entitled to weight or consideration in this case, under the circumstances stated. That they are without substantial force in any case, will appear upon consideration of the fact that the tax paying dates are fixed by law, known to all property owners; that the protection of the latter consists in the possession of the receipted tax bills, and that there is no greater difficulty or hardship in seeing that the tenant delivers these at the tax payment dates than in seeing that the rent is paid at the rent instalment dates.

Some reference to certain of the points contained in the brief for appellants in No. 202 may, perhaps, be of service or convenience.

1. At page 23, the allegation that the appellee had complied with each and every of the terms of the lease with the single exception of the tax instalment for which sale was made is stated to be untrue, because certain other instalments were not paid until after they were due. The circumstances under which these taxes failed of prompt payment have been already pointed out in this brief, as well as in the record, and need not be here repeated. All of them had been fully paid, with the single exception specified, more than a year before this suit was instituted, vindicating the statements of the bill in this regard, except for purposes of verbal criticism only.

2. The effort, at pages 24, 57, and 59, to convict Harry King of stating that the default in payment of the taxes arose from the fact that he "had not charged his mind with it at all," is precisely the same, and is based upon the same incomplete extract from his testimony, as in the brief for the appellant in No. 203; and, as above pointed out, that extract must be read out of connection with his testimony upon the same subject, at page 170 of the record, in order to appear colorably open, even, to the construction contended for.

3. The bill, alleging at page 5 that the action of Cohen in going to Rochester on September 30 to purchase the tax title was "entirely acquiesced in by the said Webb, acting on behalf of the said Kennedy, no effort being made either by her or by him to prevent the acquisition of a title, colorable or otherwise, adverse to her and destructive of her own interests," is argued at pages 27-30 of the brief to be untrue, apparently upon the ground that there was no verbal acquiescence, but, on the contrary, a verbal dissent; the argument,

however, not going to the extent of attempting to deny that there was the kind of non-acquiescence thus charged by the bill. The latter further charging, at page 9 of the record, that the landlord and tenant proceeding of November 9 was instituted by Mrs. Kennedy under pressure and menace exerted upon her in the latter part of October by the Kanns, this, at pages 31-2 of the brief, is said to be contradictory of the prior charge of acquiescence on the former occasion; while, at pages 46-8 of the brief, it is denied that the Kanns offered any menace, and at pages 40-1 it is asserted that all the answers deny that any agreement ever existed to the effect that the Kanns would not enforce the tax title if Mrs. Kennedy would enforce the forfeiture, but would set it up against her if she should refuse to do so. While, concededly, these denials are contained in the answers, Mr. Webb's testimony at pages 291-2, 318, 319, that the Kanns offered to surrender the tax certificate and take a lease if the Kings were gotten rid of, that otherwise they would hold the tax title adversely and in hostility to Mrs. Kennedy, would possibly bring ejectment, and that she must take the consequences, that Mr. Webb regarded these representations as a "threat" and "acted accordingly," informing appellee's agent, Cahill, that it was "impossible to negotiate with him" because this could only be done "by fighting for the existence of the property, and he did not care to run that risk for this lease" (Record, p. 352), is without attempt at contradiction, or of any explanation which will reconcile the testimony with the denials in the answers thus referred to in the brief.

At pages 45-6 of the brief it is claimed that the declaration by appellee that she would not acquiesce in being ousted of her lease without an attempt to save her rights by resort to the courts, if the lessor should insist upon declining to accept her proposition to vacate the tax title, at her own cost and with indemnity against loss or danger from it, is to be put in the same category with the conduct of the Kanns in taking advantage of the information obtained from Mr. Webb in

regard to the tax title, acquiring it to be employed as a club over Mrs. Kennedy's head, and in actually using it, so obtained, for the purpose of coercing her into insistence upon the forfeiture, etc. The distinction, it is submitted, is too obvious to require comment.

4. Pages 32-3 are devoted to denials of the allegations in regard to information received by the appellee through Dr. Fry that Mrs. Kennedy had become willing to waive the forfeiture, and an *ex parte* affidavit of Dr. Fry in contradiction is quoted, with comments upon the omission of the complainant to call him as a witness for her. On the contrary, it is submitted, the production of Dr. Fry as a witness was rather within the power and province of the appellants, and this the record shows (pp. 434-5) they were challenged to do, but did not. That Mrs. Kennedy through Dr. Fry's intervention had become willing to waive the forfeiture if appellee would extinguish the tax title and secure her, and that she was driven from this position through the pressure and threats brought to bear upon her by the Kanns is admitted by the answers as summarized at page 7 of the brief for appellant in No. 203; while the allegation in question is in effect admitted in the Brief for Webb at pages 178-9, and in the Brief for Kanns at pages 134-5, in every substantial point except the immaterial particular that Dr. Fry communicated the fact to the complainant—how she learned the fact, so as to be able to allege it in her bill, otherwise than through him being in no way accounted for.

5. At page 16 of the Brief for the Kanns, it is alleged that they did no acts toward acquiring the premises in dispute until they had been informed that the lease had been forfeited, and that the lessee was to be evicted. If they received such information, it is quite clear that it was erroneous, since Mrs. Kennedy declined to forfeit the lease until after she could know where she was to get another tenant (Record,

pp. 94-5). Nor is the claim that the Kanns did no acts toward acquiring the property prior to the time stated, correct. Indeed, by the application of processes of argument far less insufficient than those resorted to in the opposing briefs for the purpose at attacking the original lessee, his son Harry King, Rogers and others, the claim could be most seriously questioned. Mr. Cohen had been for two years or more trying to get the King lease (Record, p. 406). In April or May, 1901, he renewed the attempt by negotiation with Harry King, telling him "that this might be the last time that he would ask him to sell the lease." His refusal was followed, in June of the same year, by an amendment to the creditors' suit charging that the lease could have been sold for $10,000 at the time of its assignment to the appellee (Record, p. 217), accompanied by an overture, in the same month, by the Kanns to Webb to take the store at an increased rental (Record, pp. 287-8). The creditors eventually submitted their case to hearing upon bill and answer, thus evidencing that the expected testimony as to the offer for the lease was not forthcoming. No proof or intimation that any one other than the Kanns desired or made overtures at any time for the premises is to be found in the testimony, and the only evidence that any offer was ever made for it, at any time, is that of Mr. Cohen at page 406, denied in every particular by Mr. King (Record, p. 476). If a question of credibility between these two witnesses must result, Mr. King is uncontradicted in any point except by Mr. Cohen, while the latter is contradicted in material particulars not only by Mr. King, but by Mr. Wiltsie, Miss Watson and Mr. Newton, and occupies a position which has certainly nothing to gain by comparison with that of Mr. King, in any phase of the case.

6. At page 17 of the brief in No. 202 the decree appealed from is complained of as having compelled a litigation for more than four years, and, at pages 62-3, that no right ex-

isted to force the complainant's title into jeopardy by the suit. This, if true, could interpose no ground for reversal in this court, whose affirmance of the decree below will effectually terminate such "risk;" and, in addition, the position taken is irreconcilably at variance with the statement of the brief in No. 202, at page 183, that by Mrs. Kennedy's acceptance of the compromise offer of the Kanns "the tax title was gotten out of the way," and that Mr. Webb accordingly thereafter "consistently acted with the Kanns."

At page 20 of the brief the claim is made that the tax sale, "whether valid or invalid, had become irredeemable by lapse of time." How an invalid tax sale becomes irredeemable is not shown. If invalid, even the money paid under it by the purchaser must be refunded to him, as is pointed out at page 93 of the brief.

Under the facts of the case as established by the pleadings and the evidence, and under the authorities, it is respectfully submitted:

1. That the tax title is clearly invalid and presents no obstacle to relief.

2. That, even if valid, the circumstances attending its purchase, and the purposes of its acquisition and for which it has been attempted to be used, are such as to prevent it being allowed to stand in the way of relief in a court of equity.

3. That the bill makes no persons parties who are not interested in each of the two questions it presents, namely, whether the tax title is valid, and whether the forfeiture shall be relieved against and the lease continued; and for this reason alone, as well as for the others stated *supra*, it is not multifarious.

4. That the courts below did not exceed their jurisdiction, either in principle or under the great weight of authority, in

holding that breach of a covenant to pay taxes may be relieved against in equity where there has been no tax sale, valid for any purpose, and where, therefore, the taxes may still be paid and the *status quo* fully restored.

5. That even if, under ordinary circumstances, the law were otherwise, as to the general power to relieve against forfeiture for breach of such a covenant, the evidence warranted the court's finding in fact that the default in the case at bar was largely, if not principally, occasioned by the lessor's own inadvertence, oversight or negligence, and its finding in law that a default, so occasioned, should not be taken advantage of for the sole purpose, confessed on the record, of getting rid of the unexpired term and of obtaining a higher rent.

6. That in imposing one-half of the costs of the case upon appellants in No. 202, in view of the extent and of the character of their responsibility for the litigation, and in refusing costs as between solicitor and client to appellant in No. 203, incurred in attempting to defeat the appellee of her lease under the circumstances, and for the purposes stated above, and in "acting consistently with the Kanns" in their course in the matter throughout the litigation, and confessedly for two months before, the courts below were well within their judicial discretion with respect to the question of costs.

7. That there is no error in the decree appealed from, and that it should be affirmed.

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Solicitors for Appellee.